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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. .....

JOS. SCHLITZ BREWING COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA

and

GENERAL BREWING COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

This is a direct appeal from the final judgment of the United States District Court for the Northern District of California, Southern Division, which was entered on March 28, 1966, adjudging violations of Section 7 of the Clayton Act, as amended, and ordering divestiture. This Statement will show that the Court has jurisdiction of the appeal and that the questions presented are unlike any considered in prior decisions of this Court and are important to the administration of Section 7 in the public interest. The questions not only require plenary consideration, but unless probable jurisdiction is noted, Schlitz will be "deprived of any appellate review" of an extremely harsh decree entered by a single district judge. *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175 (1963).

Opinion Below

The opinion of the district court (reprinted *infra*, pp. 1a-49a, appendices A-F omitted) is reported at 253 F. Supp. 129 and 1966 CCH Trade Cas. ¶ 71,725 (appendices A-G omitted).

Jurisdiction

The United States filed a civil action on February 19, 1964, in the District Court for the Northern District of California, Southern Division, alleging violations of Section 7 of the Clayton Act, as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964). The final judgment of the district court adjudging appellant to have violated the statute as charged and ordering divestiture was entered on March 28, 1966, and notice of appeal was filed in that court on April 27, 1966. The district court granted appellant until August 26, 1966, to docket the case and file the record here.

The jurisdiction of this Court to review the final judgment of the district court by direct appeal is conferred by Section 2 of the Expediting Act, as amended, 62 Stat. 989 (1948), 15 U.S.C. § 29 (1964), 49 U.S.C. § 45 (1964). *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 304-11 (1962).

Statute Involved

Section 7 of the Clayton Act, as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964), provides in pertinent part:

> No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Questions Presented

Jos. Schlitz Brewing Company, an American brewer, purchased a controlling stock interest in John Labatt Limited, a Canadian brewer, solely to enter the Canadian beer market. Schlitz purchased stock in an existing Canadian brewer because it could not otherwise practicably enter the Canadian market, which is dominated by three companies and is sheltered from outside competition by local laws and practices. Sales of Labatt beer and ale in the United States have been and are insignificant.

At the time of the stock purchase, Labatt controlled General Brewing Corporation, a western United States brewer. Schlitz wanted no part of General Brewing from the outset of the transaction. It had tried unsuccessfully to resolve Labatt's interest in General Brewing before purchasing any Labatt shares. It was prevented from bringing about a sale of that interest after purchasing the Labatt shares by a restraining order, which the district court, at the government's insistence, refused to modify so that the Labatt interest in General Brewing could be sold. Under Labatt's aegis and long before Schlitz purchased the Labatt shares, General Brewing, once the foremost brewer in California, had become a failing, profitless company.

Accordingly, the first question presented by this appeal is:

(1) Whether it was not entirely proper under Section 7 of the Clayton Act, as amended, for Schlitz to enter the Canadian beer market, from which American brewers are otherwise foreclosed, by purchasing a controlling stock interest in Labatt, provided Schlitz caused Labatt to dispose of its interest in General Brewing.

Questions subsidiary to this question are:

(2) Whether Schlitz should not have been afforded the opportunity, through pro tanto suspension of the temporary restraining order, to explore the sale by Labatt of its interest in General Brewing;

(3) Whether, in all events, divestiture by Schlitz of the Labatt shares should be required only if Labatt retains its interest in General Brewing and then only if General Brewing continues in the brewing business.

Additional questions presented are:

(4) Whether the district court correctly ruled that the earlier purchase by Schlitz, then a struggling seller of premium beer in California, of the assets of Burgermeister Brewing Corporation, a rapidly declining brewer of popular priced beer in California, may adversely affect competition in the production and sale of beer, notwithstanding: (a) the decision by the Antitrust Division in 1961 not to file suit to enjoin the purchase, (b) the filing of suit to set aside the purchase more than two years later and only after Schlitz had purchased the Labatt shares in 1964, (c) the presentation by the government at trial in 1965 of virtually the same evidence Schlitz furnished the Antitrust Division in 1961, and (d) uncontroverted additional evidence showing no adverse effect on competition in the sections of the country or geographic markets found by the court;

(5) Whether the right of Schlitz to a fair trial was infringed by (a) the district court's denial of Schlitz's requests for pre-trial discovery during the interval between the setting of the trial date and the start of trial and (b) the court's refusal to reopen the record to receive new evidence when General Brewing, after trial but before decision, sold one-third of its brewing capacity to Miller Brewing Company, notwithstanding the government's in-

sistence throughout that General Brewing be kept intact and that Schlitz not be allowed to bring about a sale of Labatt's interest in General Brewing;

(6) Whether the district court's findings of fact and conclusions of law satisfy the requirements of Rule 52 of the Federal Rules of Civil Procedure and the trial court's obligation to the reviewing court and the parties to set forth adequately the reasons for its decision.

Statement

The Government's Complaint

In February 1964, Schlitz purchased a controlling stock interest in John Labatt Limited, a Canadian brewer. At that time, Labatt controlled General Brewing Corporation, a regional brewer marketing in several western states. The indirect interest that Schlitz would have had in General Brewing through ownership of the Labatt shares was to become the center of controversy—notwithstanding Schlitz's purchase of the Labatt shares solely to enter the Canadian beer market, not to acquire an interest in General Brewing, and its repeated offers to extinguish any such interest by having Labatt sell its holdings in General Brewing.

Previously, on December 30, 1961—after the Antitrust Division had investigated the proposed transaction and decided not to oppose it—Schlitz had purchased the assets of Burgermeister Brewing Corporation, a regional brewer marketing in several western states.

The government's complaint, filed on February 19, 1964, charged that Schlitz's purchase of the Labatt shares and the Burgermeister assets violated Section 7 of the Clayton Act, as amended, because the effect of each purchase might be substantially to lessen competition or to tend to create a monopoly in the production and sale of beer in the United

States and three geographic submarkets. It sought divestiture of the Labatt shares and the Burgermeister assets. Schlitz denied the substantive allegations of the complaint, while its co-defendant, General Brewing, admitted the substantive allegations insofar as Schlitz was concerned. General Brewing, undoubtedly at the behest of Labatt's management, which opposed Schlitz's entry into Canada, assisted the government in prosecuting the case.

Schlitz's Purchase Of The Labatt Shares

Schlitz purchased 39.3 per cent of the outstanding common stock of Labatt, third largest of the Canadian brewers with total sales of 2,370,000 barrels in fiscal 1964-65.*

Schlitz and other American brewers have been trying to enter the Canadian beer market for many years, but they have not been able to overcome the barriers placed in the way of such entry. Tariffs and taxes collected by the national and provincial governments on beer imported into Canada are prohibitive. Although Canada is the nearest foreign market for many American brewers, only 1,261 barrels of American beer have been exported to Canada since 1950 and not a single barrel since 1958.

Legal and practical considerations similarly prevent American brewers from independently brewing beer in Canada for sale there. If an American brewer managed

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* Very small amounts of beer and ale brewed by Labatt in Canada, approximately 39,000 barrels in 1963, are sold to American importers for resale in the United States. The sales are substantially confined to areas, such as Buffalo, New York, and Detroit, Michigan, where advertising originated in the United States and ostensibly intended to reach American consumers is actually aimed at beer drinkers in Canada. Such advertising by Labatt would probably be illegal if originated in Canada.

to obtain the necessary licenses, restrictions on pricing, marketing, advertising, and selling practices would place it at an insurmountable disadvantage vis-a-vis entrenched Canadian brewers.

In short, the only feasible way for Schlitz or any other American brewer to enter the Canadian market is by purchasing an existing Canadian brewer. Aside from Labatt, there are only two other Canadian brewers which could afford meaningful entry into Canada. Neither one has been for sale, and both had and still have substantial interests in American brewers. Other Canadian brewers are so small and operate in so few provinces that their purchase would be uneconomic for an American brewer trying to enter Canada.

Consequently, when Schlitz learned in 1963 that members of the Labatt family were interested in selling their stockholdings in the Labatt company, it pursued the matter and eventually purchased the shares at issue here.

Labatt unfortunately controlled General Brewing. Schlitz tried to resolve Labatt's holdings in General Brewing before it purchased any Labatt shares. Failing this, Schlitz decided to solve the problem after it acquired a voice in Labatt's management and has since repeatedly offered to vote its shares to bring about a sale of Labatt's holdings in General Brewing. It would have done so but for entry of a temporary restraining order by the district court. (*infra*, p. 18a)

The Temporary Restraining Order

On the same day the complaint was filed, the district court entered an ex parte order, which, among other things,

enjoined Schlitz from "exercising any dominion or control over stock of John Labatt, Ltd., already acquired."*

During and after the trial Schlitz repeatedly asked the district court to suspend the restraining order so that the principals of Schlitz, General Brewing, and Labatt could, subject to court approval, negotiate a resolution of some of the problems generated by the lawsuit, including the possible sale of Labatt's holdings in General Brewing. Schlitz had been warned by the court and the government that such negotiations would otherwise constitute a violation of the order, unless their purpose was to arrange a sale of Schlitz's Labatt shares. The government opposed suspension of the order precisely because it feared Schlitz would influence Labatt to dispose of its holdings in General Brewing and thereby remove the only objection the government had to Schlitz's control of Labatt.

The district court denied each motion made by Schlitz. As a result, the restraining order was in effect from the filing of the complaint until the entry of judgment, a period of more than two years. During that time, when 39.3 per cent of Labatt's outstanding common stock was in limbo and its management was not accountable to a true majority of the company's stockholders, it appears that Labatt was reorganized into a holding company, brewing operations were transferred to a subsidiary, valuable real estate was sold, acquisitions of non-brewing properties were made, and joint ventures with European brewers were undertaken—one of which made General Brewing the beneficiary of an illicit division of world beer markets.

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* The order was thereafter extended from time to time with the consent of the parties pending the filing of the government's application for a preliminary injunction. The government filed its application approximately one year later, but no order was entered granting or denying it.

The Issue Respecting The Labatt Shares

Having stymied Schlitz's efforts to renounce the indirect interest it otherwise would have in General Brewing by reason of its holdings in Labatt, the government focused its legal attack exclusively on the competitive implications of that interest. Oblivious to its bootstrapping, the government never claimed that Schlitz's holdings in Labatt would offend Section 7 absent Labatt's control of General Brewing. This is understandable because there is no part of the United States in which Schlitz and Labatt have been, are now, or are potentially substantial competitors. At most, sales of Labatt products in the United States would add four-hundredths of one per cent to Schlitz's share of total national beer sales. Although several witnesses testified that Schlitz control of General Brewing could impair competition in the brewing industry, *not one believed that Schlitz control of Labatt standing alone posed any such threat.* Indeed, after hearing the government's case-in-chief, the district court itself declared: "If Labatt had had no interest in General Brewing, the Court is of the tentative view that Labatt's participation in the American market is and has been so insignificant that it would not preclude Schlitz from acquiring Labatt . . . . I am inclined, the more I think about it, I am inclined to so view the matter." (Tr. 889)

Nevertheless, the government theorized that Labatt control of General Brewing promised to enhance competition and, on that theory, rejected as a basis for decision or settlement of the case Schlitz's willingness to divest itself of the Labatt shares if Labatt retained control of General Brewing. But conflicts between theory and reality belied the government's position. In the course of the Labatt-General Brewing relationship, General Brewing had been transformed from a leading competitor in the West to a failing, profitless company.

Between 1949 and 1958, General Brewing was the foremost brewer in California and was a substantial factor in other western states. In 1958, General Brewing's peak year, Labatt acquired its initial interest in the company and by 1964 controlled approximately 64 per cent of General Brewing's outstanding common stock. 1958 also marked the onset of General Brewing's collapse as a viable brewer. Its sales dropped from 2,265,000 barrels in 1958 to 1,751,000 barrels in 1964 or more than 22.5 per cent. Over the same period, its profits plunged from approximately $3,900,000 in 1958 to a net loss exceeding $827,000 in 1964. At trial, a loss of $1,000,000 was projected for 1965; it actually exceeded $2,300,000.*

Significantly, General Brewing's decline occurred at a time when total beer sales in California, where approximately 60 per cent of its sales were made, increased more than 31 per cent and when total beer sales in the United States increased more than 11 per cent.**

In the face of these facts and Labatt's trial admission that it was not prepared to assist General Brewing financially, the government persisted in arguing that General Brewing had benefited from Labatt's control. It even claimed that General Brewing was about to embark on an expansion program under Labatt's guiding hand, which would make it a national brewer and thereby increase competition in the brewing industry. According to the government, this expansion was to be accomplished by merger and acquisition. Strangely, the government helped thwart the purchase of General Brewing from Labatt by Heileman Brewing Company, a small, aggressive Middle Western

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* As its sales and profits dwindled, General Brewing paid to Labatt at least $300,000 in consulting fees and to Labatt or Labatt controlled companies dividends exceeding $5,000,000.

** The national increase is through 1963.

brewer. The uniting of General Brewing and a brewer such as Heileman would have given the government what it professed it wanted.

After trial but before the district court had announced its decision, General Brewing agreed to sell its Azusa, California, brewery to Miller Brewing Company. The brewery, representing approximately 34 per cent of General Brewing's total capacity, served an area where General Brewing made the largest part of its sales. General Brewing and Miller advised the government of the sale, which was to be timed so that it would not take place until after the district court would have rendered its decision. No one thought it advisable to inform either the court or Schlitz of this development, even though the integrity of General Brewing as a viable competitor was essential to the government's theory of the case.

Schlitz fortuitously learned of the sale and promptly asked the district court to reopen the record so that evidence respecting the sale and its implications could be presented *before* the court rendered its decision. The sale clearly appeared to eviscerate the government's entire case. For it not only reduced General Brewing's actual and potential market shares, but signally demonstrated Labatt's inability to reverse General Brewing's precipitous decline and mocked any claim that General Brewing was Labatt's vehicle for creation of a national brewer. (cf. *infra*, p. 3a)

In spite of Schlitz's warnings to the contrary, the district court was led to believe that the proceeds of the sale, approximately $8 million, would be available to General Brewing for rehabilitation and possible expansion eastward. Officers of General Brewing admitted, however, in the course of discovery *in another lawsuit*, that the proceeds would be used to pay off an outstanding debt.*

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* Although Schlitz so advised the district court, the court made a contrary finding in its decision on the merits. (*infra*, p. 3a)

The district court denied the motion to reopen, stating that it would not interfere with "an exercise of General Brewing's independent business judgment" and that it believed the sale was a step forward, as General Brewing had represented it to be. (*infra*, p. 3a) Schlitz had not asked that the sale be enjoined or interfered with in any way, only that evidence respecting it be taken under oath with opportunity for cross-examination.

* * *

In its decision on the merits, the district court acknowledged that Labatt itself was not a significant factor in the American brewing industry. (*infra*, p. 36a) Accepting the government's theory of the case, however, it found the acquisition unlawful solely because of Labatt's control of General Brewing.* (*infra*, pp. 14a-16a, 27a) Complete and unconditional divestiture of the Labatt shares was ordered. (*infra*, pp. 47a-48a)

The Acquisition Of Burgermeister's Assets

Responding to the Antitrust Division's request of September 1961 for information that would be "helpful in evaluating" its contemplated purchase of the Burgermeister assets, Schlitz submitted materials revealing the terms of the transaction, the volume of sales and share of sales of the

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* Registering demonstrably false doubts, the court below questioned whether Schlitz had purchased the Labatt shares solely to enter Canada and whether it "could have gone a great deal further in making sale of General Brewing a prerequisite for its purchase of Labatt stock." (*infra*, pp. 27a n. 2, 38a) It is indisputable that Schlitz was not out to capture control of General Brewing and had tried to negotiate General Brewing's sale by Labatt. Even the president and executive vice-president of Labatt, who had participated in the negotiations and were admittedly opposed to Schlitz's purchase of the Labatt shares, so testified. Above all, Schlitz time and again offered to divest itself of the Labatt shares if it could not effect a sale of Labatt's holdings in General Brewing.

two companies and their competitors, and the wholesaler alignments of the two companies. (*infra*, pp. 19a-20a)

Among other things, this material apprised the Antitrust Division that Burgermeister operated one brewery, located in San Francisco. It produced one brand of beer, Burgermeister, which was sold at popular prices. Approximately 90 per cent of Burgermeister's sales were made in California, the remaining 10 per cent in nine other western states.

Burgermeister recorded its highest volume of sales in 1955 when it ranked second in California with 16.12 per cent of total sales and had 1.3 per cent of total sales nationally. Its sales and share of sales dropped measurably in subsequent years. While total industry sales nationally *increased 4.8 per cent* from 84,977,274 barrels in 1955 to 89,028,431 barrels in 1961 (the year preceding the acquisition), Burgermeister's total sales *dropped 32.16 per cent* from 1,071,003 to 726,533 barrels. For the same period, total industry sales in California, where Burgermeister sold 90 per cent of its beer, *increased 27.23 per cent* from 6,065,044 to 7,716,565 barrels, while Burgermeister's California sales *dropped 33.11 per cent* from 977,561 to 653,898 barrels. Burgermeister's share of California sales had fallen to 8.5 per cent by 1961, down from 16.12 per cent in 1955.

Burgermeister's net income began deteriorating before its sales volume did. Net income fell from $2,053,000 in 1952 to $944,687 in 1959, to $720,951 in 1960, to $408,602 in 1961—a drop of more than 80 per cent in ten years.

In 1955, out of total sales of 5,780,000 barrels, Schlitz sold 243,190 barrels in California and had 4.01 per cent of total California sales. By 1961, its share of California sales had fallen to 3.6 per cent on slightly increased sales of 283,278 barrels.

Conferences were held with the Antitrust Division after the materials had been submitted, and the closing was put off for several months until the matter appeared resolved. The then head of the Antitrust Division testified at trial by way of stipulation that, while he did not specifically recall in 1965, he may have stated to Schlitz in 1961 that he was not prepared to take any action. It is a matter of record that no steps were taken to forestall the transaction. (*infra*, pp. 19a-20a)

Having submitted the information requested by the Antitrust Division to enable it to evaluate the transaction, having conferred with representatives of the Division over a period of several months, and no adverse action having been taken, Schlitz completed the purchase on December 30, 1961. More than two years later, when it filed an action to enjoin Schlitz's purchase of the Labatt shares, the government sought for the first time to set aside the acquisition of Burgermeister's assets.

At the filing of the complaint, post-acquisition data showed that Schlitz had tried to check Burgermeister's decline as a viable brand. It invested $4 million in Burgermeister's plant and facilities, improved the Burgermeister formula, designed new labels and packaging, developed new marketing programs, and took steps to achieve better distribution at the wholesaler level. For its efforts, Schlitz lost money on the brand in the first two years after the acquisition.

Furthermore, a comparison of combined Schlitz/Burgermeister sales for the three years preceding the acquisition with their combined sales for the first three years following the acquisition reflected no adverse effect on market shares. Their combined sales in California actually *fell 1.3 per cent* from 1,179,665 barrels in 1959 to 1,036,762 barrels in 1964, whereas for the same period total California sales of all

brewers *increased more than 23 per cent* from 7,433,511 to 9,152,908 barrels. Although their combined sales volume was off only 1.3 per cent, their combined percentage of total California sales dropped from 15.9 per cent in 1959 to 11.3 per cent in 1964. Nationally, their combined share of total sales increased .5 per cent from 7.8 in 1959 to 8.3 in 1963, and as the court below was to find, the "evidence was not sufficient to establish . . . a substantial lessening of competition, actual or potential, . . . in the United States." (*infra*, p. 26a)

Except for post-acquisition data, the basic facts available to the Antitrust Division in 1961 were adduced in support of the complaint's allegations. The government nevertheless objected to the introduction of any evidence respecting its decision not to file suit in 1961 and took issue with Schlitz's contention that the Antitrust Division had issued what amounted to an informal clearance of the acquisition. It called a former assistant attorney general in charge of the Antitrust Division to testify that merger clearances are granted only in response to written requests, that Schlitz had not submitted such a request, and that there is no such thing as an informal or oral clearance (*infra*, p. 20a)—all despite the public statement by the current head of the Antitrust Division that there are indeed informal or oral indications by the Antitrust Division as to whether or not it will move to enjoin a proposed acquisition, which is precisely what would have been said in a formal clearance letter. 30 A.B.A. Section of Antitrust Law 100, 120-21 (1966).

In all events, the government had more than three and one-half years after the acquisition and before trial to detect any anticompetitive manifestations resulting from the purchase of Burgermeister's assets by Schlitz. Post-acquisition market shares provided no such evidence, and

not one disinterested witness would testify that competition had been injured or was threatened in any way by the acquisition. To the contrary, several thought competition had been enhanced.

Before, during, and after the trial, the district court suggested that the case be settled by allowing Schlitz to retain the Burgermeister assets if it disposed of the Labatt shares. The court stated its belief that the government would not have tried to undo the acquisition of Burgermeister if Schlitz had not subsequently purchased the Labatt shares. Accepted by the government, the proposal was rejected by Schlitz because of the Antitrust Division's decision in 1961 not to challenge the Burgermeister acquisition and Schlitz's unwillingness to be forced into abandoning entry into Canada, which it believed Section 7 was never intended to reach.

* * *

In holding Schlitz's acquisition of the Burgermeister assets to be unlawful, the district court cited concentration trends in the brewing industry, the combined market share of Schlitz and Burgermeister,* and several wholesaler realignments made after the acquisition.** (*infra*, pp. 23a-

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* As to both the Burgermeister and Labatt acquisitions, the court portrayed as decisively significant the combined Schlitz/Burgermeister/General Brewing market shares. (*infra*, pp. 14a-16a, 27a) On the facts of this case, however, there was no such market share to consider and the court's findings in this connection are simply beside the point. Schlitz wanted no part of General Brewing, and if Labatt did not dispose of its holdings in General Brewing, Schlitz was prepared to divest itself of the Labatt shares.

** The Azusa brewery purchased by Miller from General Brewing is one-fifth again as large as the Burgermeister brewery purchased by Schlitz. Significantly, it will enable Miller to increase sales substantially, especially in California where its share could equal the Schlitz/Burgermeister share held to be unlawful.

27a) It dismissed as meaningless the Antitrust Division's investigation of the acquisition in 1961 and disregarded without explanation affirmative testimony that the acquisition had not impaired and did not threaten to impair competition. (*infra*, pp. 20a, 30a-31a) Casting aside stipulated facts and publicly reported sales figures, it made the astounding finding that Burgermeister was not a declining brewer. (*infra*, p. 21a) It even intimated that several wholesaler realignments made after the acquisition were "examples" of other anticompetitive effects of record, when the evidence was exactly to the contrary. (*infra*, p. 24a)

The court ordered complete and unconditional divestiture of the Burgermeister assets. (*infra*, p. 46a) Also, future brewery acquisitions by Schlitz in California were permanently enjoined, while acquisitions elsewhere in the United States were enjoined for ten years unless the government consents. (*infra*, p. 45a) Finally, introduction by Schlitz of its Old Milwaukee brand in states where Burgermeister is being sold was, in effect, banned until six months after sale of the Burgermeister assets. (*infra*, p. 47a)

The Procedures Below

Eight months after the complaint had been filed and before any discovery had taken place, except through several sets of written interrogatories and the production of documents by Schlitz,* the government filed a memorandum to set for trial under local rule 2(a). This rule provides in substance that all discovery must be completed within the next 30 days unless additional time is granted by the court. Additional time was granted upon the motions of Schlitz. Then, on May 19, 1965, the district court pro-

* During this time efforts to negotiate a settlement were underway on the basis of Schlitz's proposal that Labatt dispose of its interest in General Brewing.

posed going to trial on June 14, less than four weeks away. Schlitz advised the court that it was not prepared for trial, and on June 1, 1965, after hearing extensive argument, the court set August 16, 1965, as the trial date. After this date had been set, approximately two and one-half months remained before the trial was actually to start.

In the meantime, the parties had exchanged witness lists. On June 22, 1965, Schlitz sought the court's leave to depose *before* the scheduled trial date a limited number of the persons identified by the government and General Brewing as the witnesses they intended to call at trial, who had refused to be interviewed by Schlitz counsel. The court was advised that the government had refused to furnish Schlitz copies of documents made available to it by General Brewing and Labatt and that General Brewing had refused to allow Schiltz to interview *any* of its officers, directors, or employees, and had refused to furnish Schlitz copies of documents made available by it to the government. The district court nonetheless denied Schlitz's motions, stating that discovery would be allowed only if all parties consented. The government and General Brewing refused to consent.

Because the government maintained that the Labatt-General Brewing nexus was a beneficial one and should be perpetuated, Schlitz filed a motion on June 23, 1965, requesting the production of certain documents by General Brewing. By this motion, Schlitz sought to discover evidence bearing on the Labatt-General Brewing relationship as well as the reasons for General Brewing's decline. Except for non-controversial items that General Brewing agreed to produce, the motion was denied by the district court. Subsequent attempts to obtain the documents by subpoenas duces tecum during the trial were also unavailing.

In sum, Schlitz was denied the opportunity to depose hostile witnesses scheduled to testify against it and was also

denied access to documents required for its defense. If discovery had been allowed, Schlitz could have uncovered Labatt's true plans for General Brewing—among other things the sale of the Azusa brewery—and presented evidence on a critical issue in the case.

The trial started on August 16, and after almost four weeks of testimony, proposed findings of fact, conclusions of law, and supporting briefs were filed by the parties. Although Labatt was not a party to the action, the district court invited it to file its views. Labatt accepted the invitation and filed a brief controverting Schlitz's post-trial submission.

On March 24, 1966, the district court filed its decision. (*infra*, p. 41a) The court adopted the government's proposed findings of fact and conclusions of law virtually intact and decided every issue against Schlitz or, where it did not do so, declined to make any findings or rulings at all. (*infra*, pp. 1a-41a) Judgment was entered on March 28, 1966. (*infra*, pp. 43a-49a)

The Questions Are Substantial

I.

Section 7 Of The Clayton Act Does Not Forbid Acquisition Of Foreign Corporations, Especially Where Entry Into A Foreign Market Is Otherwise Foreclosed, And Assuming A Schlitz Interest In General Brewing Would Offend The Statute, Unconditional Divestiture Of The Labatt Shares Is Not Appropriate Relief.

On the one hand, the district court found that Labatt was not a significant competitive factor in the American brewing industry. On the other hand, the court concluded, precisely as the government had urged, that the indirect interest Schlitz would have in General Brewing through ownership of the Labatt shares violated Section 7 of the

Clayton Act. Accepting both findings, *unconditional* divestiture of Schlitz's Labatt shares is not warranted, let alone required, to restore any possible competitive impairment resulting from the acquisition.

But instead of ordering *conditional* divestiture of the Labatt shares, as would have been entirely appropriate under the government's own theory of the case, the court decreed *unconditional* divestiture and thereby effectively barred Schlitz from entering the Canadian beer market—irrespective of whether Labatt continues to control General Brewing or whether General Brewing continues in business as a brewer.

The critical question, therefore, is whether Schlitz should be allowed to retain its clearly lawful control of Labatt on the condition that Labatt dispose of its holdings in General Brewing. Such a disposition of the case would cancel any concern over the acquisition's legality under Section 7 because it would remove the only aspect of the transaction challenged by the government and held unlawful by the district court.

The sledgehammer decree entered below is plainly punitive and subordinates the paramount public interest in a competitive economy to the private advantage of foreign corporations, which are traditionally allergic to competition domestic firms must face and which exploit local laws whenever possible to lock out American competition. Indeed, the court below did not exhibit any awareness of the paradox of its decision. Labatt can freely acquire American brewers under the banner of promoting competition, but American firms have no reciprocal rights in Canada. Until Schlitz purchased the Labatt shares, no American brewer had been able to penetrate the closed Canadian brewing industry. The court's perverse decree would perpetuate that condition.

In view of the increasing investment by American business in foreign countries, the issue is one of public importance, particularly because of the inadequate decision below which unsettles prior understandings of the Act's coverage without disclosing the rationale for decision. Moreover, as this Court declared in *International Boxing Club* v. *United States*, 358 U. S. 242, 253 (1959): "The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus by-passing the usual appellate review, has always had the most careful scrutiny of this Court." See also *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 89 (1950).

II.

Antitrust Division Clearance Of Schlitz's Acquisition Of Burgermeister Was Entitled To Evidentiary Consideration, And In All Events, Schlitz's Acquisition Of This Declining Brewer Did Not Give Rise To Proscribed Competitive Effects.

Because Section 7's outer perimeter is still being surveyed by the courts, businessmen understandably seek some indication of the Antitrust Division's attitude towards a contemplated merger. This course can be especially prudent in view of the statute's backward sweep, which can force the disruptive undoing of transactions completed years ago. Cf. *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961). The district court's decision in the case at bar seriously impairs orderly conduct of business affairs by placing acquisitions initially evaluated by the Antitrust Division as to their legality under Section 7 in jeopardy of repudiation many years later without any showing of justification or change in circumstances.

Thus, the court below fundamentally misconceived the significance of the Antitrust Division's evaluation of the Burgermeister acquisition in 1961. For the court not only dismissed that fact as being entitled to no consideration at

all, but sanctioned the upsetting of an acquisition on the very evidence not deemed adequate to warrant action before the acquisition was consummated. If the district court is right, investigatory and clearance procedures are porous assurances indeed, creating only the illusion that business affairs can be conducted free of the perpetual threat of legal challenge. Congress certainly did not intend that Section 7 wreak such havoc.

Nor did the court below consider the adverse impact of divestiture on Schlitz in light of the Antitrust Division's decision not to challenge the acquisition almost five years ago. It failed to recognize that, because of Schlitz's reliance on the clearance and because of substantially changed conditions in the brewing industry, divestiture today would severely disable Schlitz in the market place and confer an unfair advantage on its competitors.

Lest there be any misunderstanding, we do not suggest that the Antitrust Division's decision not to sue constitutes any sort of estoppel against the government.* Section 7 embodies too important a national policy to allow forfeiture of the public interest. We do maintain, however, that a pre-merger clearance of the kind present here is entitled to evidentiary consideration in the event the government subsequently files suit and that some justification or change in circumstances should appear from the record if the evidence adduced in support of the complaint is the same information the Antitrust Division had before it at the outset.

The significance of such clearances is an important issue respecting the administration of Section 7 and merits plenary review by this Court. The decision below can only

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* Cf. *United States* v. *New Orleans Chapter, Ass'd Gen. Contractors*, 382 U.S. 17 (1965).

undermine public confidence in the fairness and rationality of antitrust enforcement, which in the end is indispensable to meaningful compliance with the law in the public interest.

These considerations are especially appropriate here since no decision prior to *Von's** and *Pabst*** hinted that a resulting national market share of 8 per cent or a resulting submarket share of 11 per cent was presumptively unlawful—even in an industry of declining numbers. And no decision to date impugns such market shares where the acquired company was a sharply declining market factor. As was evident to the Antitrust Division in 1961, Schlitz's purchase of the Burgermeister assets was not a "case of two already powerful companies merging in a way which makes them even more powerful than they were before." *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 278 (1966).*** Not only was Burgermeister declining absolutely as well as relatively at the time of the acquisition, but, according to the government, even Schlitz was a "struggling" competitor in California. (Post-Trial Br. p. 79)

Post-acquisition data confirmed the wisdom of the Antitrust Division's 1961 assessment. Notwithstanding its efforts after the acquisition, Schlitz could do no more than stabilize Burgermeister's sales and only at substantial cost. If Schlitz had truly derived any competitive advantage from the acquisition or if Burgermeister had been a viable brand, the situation doubtless would have been far different. However broadly Section 7 may be interpreted in cases where one thriving business unit acquires a thriving competitor, there is no basis, statutory or economic, for condemning

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* *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966).

** *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966).

*** *Pabst* was remanded to the district court so that Pabst could adduce evidence respecting, among other things, its vitality as a brewer at the time of the acquisition.

the acquisition at bar. In all events, this case raises an important issue respecting the administration of the Act and the need for a precedent governing future decisions and providing necessary legal guidance.

III.

The Trial Court's Foreclosure Of Pre-Trial Discovery By Schlitz And Subsequent Refusal To Reopen The Record To Receive Important Post-Trial Evidence Constituted Denial Of A Fair Trial.

To begin with, the unparalleled restraining order not only put the Labatt shares in limbo, but placed Schlitz at such a disadvantage that its trial preparation was severely handicapped. Hiding behind the order, the managements of Labatt and General Brewing were free to take action prejudicial to Schlitz and to assist the government in the preparation and presentation of its case. The government also used the order to guard the key element of its case against Schlitz's purchase of the Labatt shares by making it impossible for Schlitz to bring about a sale of Labatt's holdings in General Brewing. Such a sale would have eliminated any conceivable objection to the stock purchase and would have cut General Brewing loose from a debilitating influence, allowing it to become once again a significant factor in the brewing industry.

Equally destructive of Schlitz's rights was the trial court's refusal to allow Schlitz to take any depositions between the time a trial date had been set and the trial was actually to start. As detailed above, Schlitz had been furnished lists by the government and General Brewing, specifying the witnesses they intended to call at trial. The prospective witnesses who were connected with Labatt and/or General Brewing were hostile to Schlitz and refused to be interviewed by Schlitz counsel. Without any possible justification, the trial court ruled that the depositions of

these witnesses could be taken by Schlitz only if the government and General Brewing consented.

In opposing Schlitz's retention of the Labatt shares on the condition that Labatt sever its interest in General Brewing, the government insisted that "General Brewing needs the support of a company such as Labatt in order to accomplish its own plans to become a national brewer." (Post-Trial Br. p. 48) Yet when Schlitz sought discovery of documents bearing on this relationship and particularly documents revealing the reasons for General Brewing's decline under Labatt control, the trial court denied Schlitz access to the documents on the ground that it did not wish to interfere with the "independent business judgment" of General Brewing.

Most revealing in this connection is the trial court's refusal to hear evidence relating to the sale of General Brewing's Azusa brewery to Miller. Plainly, this evidence could have been presented in short order and need not have significantly delayed decision in the case. The court's ruling is especially incomprehensible since, although the case had been under submission for more than two months when the issue of the sale was first raised, the decision on the merits was not filed until more than a month later.

Neither the trial court nor the government should have an interest in interposing obstacles to the discovery and presentation of material evidence, unless they want a result not consonant with the true facts and equities of the case. It is highly irregular to resolve an important and contested matter by accepting the unsupported allegations of one of the parties, whose antagonism to the other party is a matter of record and whose motives are suspect. The Azusa sale cut across the heart of the government's entire case, which alone required reopening of the record to afford Schlitz the opportunity to present evidence and cross-examine wit-

nesses, but the court simply adopted without any hearing General Brewing's proffered representations concerning the reasons for and the consequences of the sale.

IV.

The Trial Court's Findings Of Fact And Conclusions Of Law Are Fundamentally Defective.

Apart from their substantive defects, the findings of fact and conclusions of law entered below were not prepared by the district court and do not reflect the legal reasoning believed to support the ultimate conclusion that Schlitz violated Section 7.

Rule 52 of the Federal Rules of Civil Procedure and the decisions of this Court admonish that findings should be the "product of the workings of the district judge's mind" and that conclusions should "reveal the discerning line for decision of the basic issue in the case." *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964). The requirements exist not only to facilitate the reviewing function of the appellate court, but also to insure careful and disinterested consideration by the trial court in the finding of facts from which its legal conclusions are drawn.

Paying lip service to the "bench marks" of *El Paso*, the court below annexed to its findings and conclusions three and one-half introductory pages and some comments on the proposed findings submitted by Schlitz. But these additions cannot obscure the fact that the findings and conclusions actually entered were not the product of the district judge. Significant too in this connection is the court's failure to make any findings at all in areas where the finding unavoidably would have been favorable to Schlitz.

In short, the decision below is less adjudication than fiat. The decision in this sharply contested proceeding, which

filled more than 2,000 pages of transcript covering 31 witnesses and more than 170 exhibits, is so devoid of any explication of the legal conclusions reached and the decree entered that Schlitz must speculate as to why it was adjudged to have violated the statute. Certainly the spotty comments on Schlitz's proposed findings, which were randomly gleaned from the reply briefs of the government and General Brewing, do not supply the discerning line for decision.

Particularly in light of the Expediting Act, which makes decisions by a single district judge subject only to direct review by this Court, the requirement of adequate and self-prepared findings and conclusions takes on added importance. Without the preparation of findings by the trial court itself, this Court cannot safely know what the lower court's decision means, let alone whether it is right or wrong. Nor can a trial court decision bereft of legal reasoning become a precedent governing future decisions and providing legal guidance for the businessman and his counsel. As this Court has cautioned, it is imperative in the sensitive area of competition that the decision-maker "not shelter behind uncritical generalities or such looseness of expression as to make it essentially impossible for us to determine what really lay behind the conclusions which we are to review." *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61, 81 (1953).

Lest a perfunctory and sterile decision thwart the only review available to Schlitz, this Court should grant plenary review of the correctness of the decision below and the essential fairness of the way in which that decision was reached.

Conclusion

For all the preceding reasons, the questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

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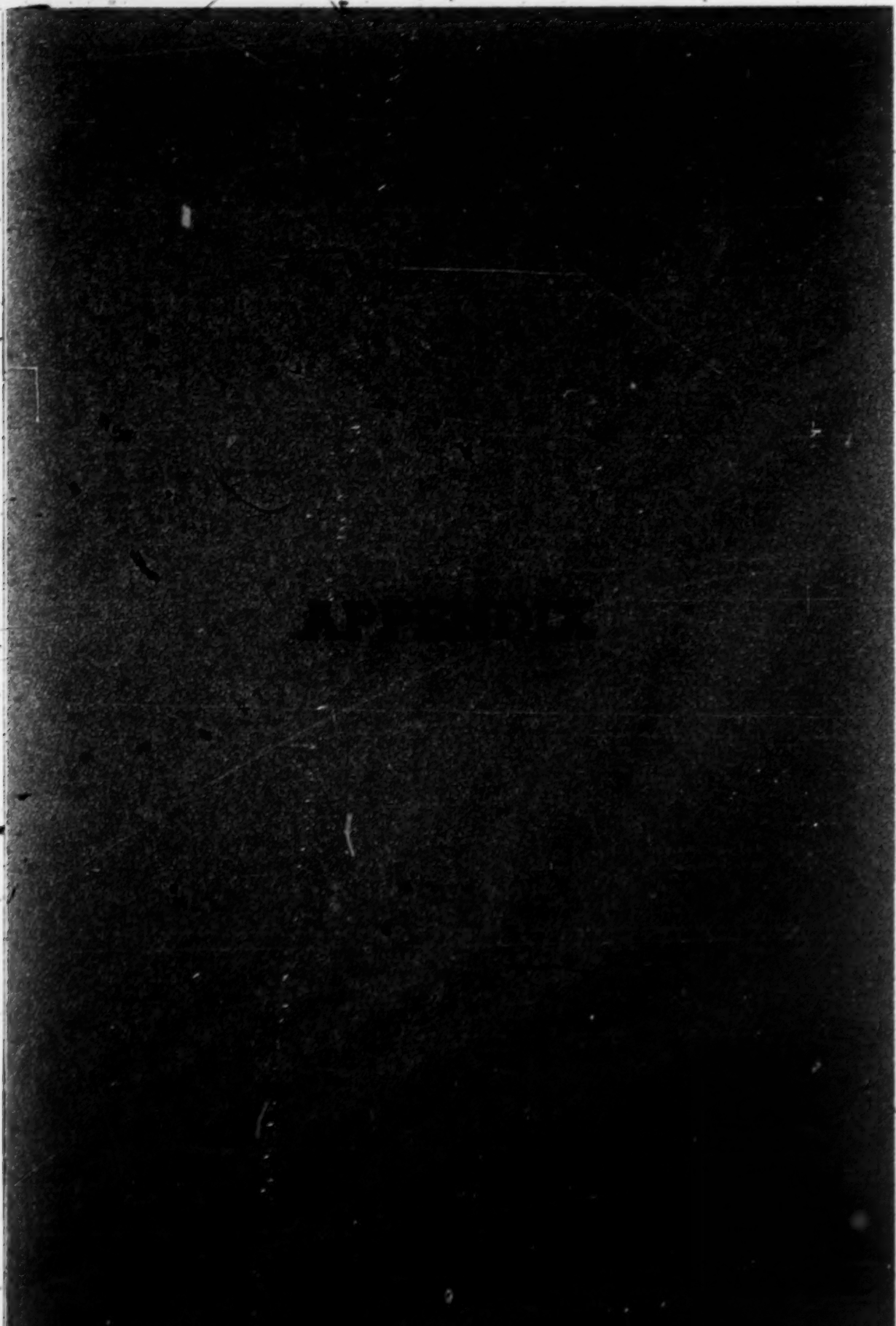

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **JOS. SCHLITZ BREWING COMPANY and GENERAL BREWING COMPANY,** **Defendants.**	**Civil Action No. 42127**

The defendant Jos. Schlitz Brewing Company is a Wisconsin corporation engaged in the production and sale of beer. The defendant General Brewing Company is a California corporation so engaged. John Labatt Limited, a large Canadian brewer, controls General Brewing Company through Labatt's ownership of a majority of General's stock.

The gravamen of the charge by the United States of America, plaintiff, is that "The effect of the purchase and acquisition of the assets of Burgermeister Brewing Corporation by defendant Schlitz and of the stock acquisition by defendant Schlitz in John Labatt, Ltd., and of each of them, may be substantially to lessen competition, or tend to create a monopoly in the production and sale of beer in the United States, the West, and the State of California in violation of Section 7 of the Clayton Act . . ." (Complaint, Page 6, lines 23-28).

The evidence adduced at the trial and the applicable law sustain the plaintiff's charge sufficiently to call for granting relief consonant with the plaintiff's prayer. The office of this memorandum is to serve as Findings of Fact

and Conclusions of Law underlying the decree to be entered. The intent is to meet the bench marks indicated, for federal trial courts in cases of this kind, by the Supreme Court in *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-57, 662-63 (1964).

Extended hearings, briefing and consideration of the trial court with all counsel were focused upon preparation of a definitive Pre-Trial Order approved by all parties. Its scope and content are indicated by the marginal notation of the subject matters listed in its table of contents.[1] That order is referenced here because, for one thing, its delineation of the issues are inserted or grouped as headings in the Findings of Fact below.

The trial court directed the parties to include, in the post-trial briefs of each, their respective proposed Findings

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1. "I. Stipulation as to Jurisdiction and Venue, Page 1; II. Factual Statement of the Parties' Versions of the Events, Page 2; III. Factual Statement of the Parties' Versions of Special Defenses, Page 4; IV. Statement Concerning the Specific Relief Sought, Page 4; V. Statement of Admitted or Undisputed Facts, Page 6; VI. Issues to be Tried, Page 128; VII. Brief Separate Statement of Points of Law, Page 132; VIII. Order With Respect to Witnesses and Exhibits, Page 132; IX. Exhibits Intended to be Offered at the Trial Except Those to be Used for Impeachment Only, Page 135; X. Lists of Witnesses, Page 147; XI. Statement as to Separate Trial of Any Issues of Fact, Page 154; XII. Statement as to Consolidation, Page 154; XIII. Submission Upon an Agreed Statement of Facts, Page 154; XIV. Appointment of an Expert, Page 155; XV. Motion to Dismiss, Page 155; XVI. Pendente Lite Relief, Page 155; XVII. Request for Any Further Discovery, Page 155; XVIII. Amendments to Pleadings, Page 155; XIX. Final Stipulations of Fact, Page 156; XX. Settlement, Page 156; XXI. Informal Pretrial Conferences, Page 156; XXII. Unusual Problems Concerning Trial, Attendance of Parties or Essential Witnesses, or Other Practical Problems, Page 156; XXIII. Further Proceedings and Trial Briefs, Page 157". (Pre-Trial Order, i. (8/5/65)).

and Conclusions. Each set has been reviewed by the trial court. While those proposed by the United States and by General Brewing have provided the basic pattern for the trial court's own Findings and Conclusions, the latter are the product of careful sifting. They incorporate many substantial additions, deletions and revisions as well as numerous other changes including citations to the record. It is believed that the Findings, Conclusions and comment show the reasoning which led this court to its decision on all relevant issues.

A final preliminary matter merits discussion. Some weeks after all parties had rested their cases, defendant Schlitz made a "Motion to Reopen the Record for the taking of Additional Evidence and for Other Relief". The motion was heard upon affidavits, memoranda and argument of counsel. It was predicated upon the post-trial agreement of General Brewing to sell to Miller Brewing Company of Milwaukee, Wisconsin, one of General's breweries, that located in Azusa, California. This brewery represents 34% of General's total potential productive capacity. The motion was opposed by the United States and, of course, by General. It was denied by the trial court in what that court considered a sound exercise of discretion. The moving papers and those filed in opposition made it clear beyond cavil, that (1) the agreement to sell was an exercise of General Brewing's independent business judgment, (2) consummation of the sale would leave General Brewing with more than adequate brewing capacity for all foreseeable increases in sales in all markets which it now taps, (3) General Brewing's receipt of $8,000,000 for the sale would materially strengthen its capacity to compete with all its competitors, including, notably, Schlitz, (4) the sale would improve General Brewing's ability to expand into other areas and (5) it would strengthen General Brewing as a vehicle for Labatt's competition in the U.S. market.

The court did order General Brewing promptly to report to the court all express or tacit commitments for any subsequent disposition of any major assets, thus assuring the court of ample opportunity to protect Schlitz in the matter, for example, of its professed concern that General Brewing was engaging in a process of liquidation, despite documented and convincing contrary assurance to the court on General Brewing's part.

FINDINGS OF FACT

Jurisdiction

1. Defendant Jos. Schiltz Brewing Company (hereinafter referred to as "Schlitz") is a corporation organized and existing under the laws of the State of Wisconsin, with its principal office located in Milwaukee, Wisconsin. (Pre-Trial Order, p. 1).

2. Defendant General Brewing Corporation (formerly known as Lucky Lager Brewing Company and hereinafter referred to as "General Brewing") is a corporation organized and existing under the laws of the State of California, with its principal office located in San Francisco, California. (Pre-Trial Order, p. 1).

3. John Labatt Limited (hereinafter referred to as "Labatt") is a Dominion corporation organized and existing under the laws of the Dominion of Canada, with its principal office in London, Ontario, Canada. (Pre-Trial Order, p. 2).

4. Prior to December 31, 1961, Burgermeister Brewing Corporation (hereinafter referred to as "Burgermeister") was a corporation organized and existing under the laws of the State of California, with its principal office in San Francisco, California. (Pre-Trial Order, p. 2).

5. Defendants Schlitz and General Brewing are engaged in commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. §18. Prior to December 31, 1961, when its assets were purchased by Schlitz, Burgermeister was engaged in commerce within the meaning of Section 7 of the Clayton Act, 15 U.S.C. §18. (Pre-Trial Order, p. 2).

6. Both defendants transact business and are found within the Northern District of California, Southern Division. (Pre-Trial Order, p. 2).

7. The action arises and is brought by the plaintiff under the antitrust laws of the United States, more particularly the Clayton Act, 15 U.S.C. §§18 and 25. (Pre-Trial Order, p. 1).

Issues Relating To Line of Commerce

1. Is the production and sale of beer a line of commerce within the meaning of Section 7 of the Clayton Act and the appropriate product market for determining the effects on competition of the acquisitions by defendant Jos. Schlitz Brewing Company of the assets of Burgermeister Brewing Corporation and of stock of John Labatt Limited?

2. Is the production and sale of all malt beverages a separate line of commerce within the meaning of Section 7 of the Clayton Act, and if so, is it an appropriate line of commerce to be considered in determining the effects on competition of the acquisitions challenged by the complaint?

3. Is the production and sale of each price level of beer, one of the malt beverages, a separate line of commerce within the meaning of Section 7 of the Clayton Act, and if so, is each level an appropriate line of commerce to be considered in determining the effects on competition of the acquisitions challenged by the complaint?

4. Is the production and sale of ale, another of the malt beverages, a separate line of commerce within the meaning of Section 7 of the Clayton Act, and if so, is it an appropriate line of commerce to be considered in determining the effects on competition of the acquisitions challenged by the complaint?

8. The term "beer", in the context of the relevant line of commerce, includes beer, lager, ale, porter, stout and malt liquor, even though there is some conflict in expert testimony and that of members of the industry as to ale. A single brewery can produce beer, lager, ale, porter, stout and malt liquor. Moreover, regardless of the niceties of definition, sales in the United States of lager, ale, porter, stout and malt liquor are so insignificant, compared with sales of beer, as to make the inclusion or exclusion of lager, ale, porter, stout and malt liquor, or any one or more of them, of no consequence to any issue in this case. (Tr. 387, line 20—393, line 19; Tr. 150, line 6—151, line 11; Tr. 1552, lines 6-8; Tr. 468, lines 1-5).

9. Beer is produced in unique production facilities, breweries, and is marketed through specialized vendors who are referred to as wholesalers or distributors. (Tr. 192, line 25—193, line 10; Tr. 158, lines 13-25; Tr. 1552, lines 6-8).

10. There is very little difference in price or quality between the cheapest and the most expensive ingredients used in brewing beer in the United States. (Tr. 316, lines 10-16; Tr. 404, lines 6-20; Tr. 405, lines 20-23; Tr. 389, lines 3-19).

11. Beer has its own pricing structure and sells at a wide spectrum of prices; in California, for example, the range is from 79 cents through $1.44 per six-pack of 12-oz. cans. (Pre-Trial Order, pp. 85-115; Tr. 1517, line 1—1519, line 19).

12. For many years it has been the practice in the brewing industry to refer to various brands of beer by terms such as "premium beer", "regional beer" or "popularly priced beer" and "local price" or "shelf beer". The term premium beer has generally referred to those beers which have been priced somewhat higher than the popular or regional beers. Such premium beers include Budweiser (Anheuser-Busch, Inc.), Schlitz (Jos. Schlitz Brewing Co.), and Miller High Life (Miller Brewing Co.). Popularly priced or regional beers include such brands as Lucky Lager (General Brewing Co.), Burgermeister (Jos. Schlitz Brewing Co.), Hamms (Theo. Hamm Brewing Co.), and Falstaff (Falstaff Brewing Corp.). The so-called price beers are beers which generally are not extensively advertised and sell at a price below that of the popularly priced beers. Such beer is often sold by grocery store chains as private label beer, i.e., the specified chain has the exclusive right to sell beer under the label. Other beers exist which do not fit into any of the particular categories described above. For example, Coors beer and Olympia beer sell in California at prices midway between the premium and the popular level. Miller High Life sells in some areas, such as California, at a price above Budweiser and Schlitz. Other beers sell at a price midway between the popular and the price beer level. Some beers have moved from one category to another or have shifted from a category to an in-between level. (Pre-Trial Order, p. 9; Tr. 1517-1519).

13. There are no significant differences in the costs of labor nor equipment for production of the various brands of beer. (Tr. 434, lines 6-15).

14. All brands and types of beer compete with each other in price, image, point of sale advertising, media ad-

vertising, shelf space, floor display, refrigerator position and in attention from wholesalers and retailers. (Tr. 114-116; Tr. 193, lines 11-17; Tr. 208, line 20—209, line 4; Tr. 316, line 9; Tr. 343, lines 16-22; Tr. 454, line 4; Tr. 585, line 21—587, line 4; Tr. 1236, line 21—1237, line 8; Tr. 1579, lines 1-11; Tr. 1583, line 18; Tr. 1588, line 18 *et seq.*; Tr. 1856, line 13—1857, line 24).

15. There is both public and industry recognition of beer as a separate and unique product. (Tr. 193, line 15; Tr. 386, line 20; Tr. 387, line 9; Tr. 454, lines 7-22; Tr. 1598, lines 13-20; Tr. 1856, line 24—1857, line 5; see also citations for Finding 14).

16. Beer is a line of commerce. (Findings 8-15, inclusive).

Issues Relating To Section of the Country

5. Are the following areas, or any of them, sections of the country within the meaning of Section 7 of the Clayton Act:

(a) The United States;

(b) the eight Western States of California, Oregon, Washington, Idaho, Montana, Nevada, Utah and Arizona;

(c) the State of California;

(d) the State of Hawaii;

(e) or some part of the United States less than the entire United States but larger than or different from the eight Western States;

and if so, is each or any such section a relevant geographic market to be considered in determining the effects on competition of the acquisitions challenged by the complaint?

17. The United States as a whole is a geographic market for the production and sale of beer. (Tr. 956, lines 21-22; Tr. 592, line 8; Tr. 482, lines 7-11).

18. The Eight Western States area consists of the contiguous States of California, Oregon, Washington, Idaho, Montana, Nevada, Utah and Arizona. Its boundaries are the Pacific Ocean, the Canadian and Mexican borders, and, approximately, the Continental Divide.

19. Freight rates are a substantial factor in the sale of beer. (Tr. 204, line 13; Tr. 91, lines 21-23; Tr. 313, lines 17-19; Tr. 451, line 19—452, line 10).

20. Most breweries and the bulk of brewing capacity in the western portion of the United States are located along the Pacific Coast. (Pre-Trial Order, pp. 47-49).

21. Freight rates make it more economical for brewers to supply beer to points west of the Continental Divide from Pacific Coast breweries, rather than from Eastern or Midwestern breweries. Brewers who have breweries both on the Pacific Coast and in the Midwest generally supply the Eight Western States area from their Pacific Coast breweries and supply areas east of the Eight Western States area from their Midwestern breweries. (Tr. 1354, line 16—1355, line 3; Tr. 584, line 11—585, line 3; Plaintiff's Exhibit 35).

22. Brewers attempt, for profit purposes, to sell a maximum quantity of their production as close as possible to the brewery at which it is produced. (Tr. 94, lines 2-11; Tr. 314, line 22).

23. Approximately 80% of all beer sold within the Eight Western States in 1963 was produced in that area. An additional 13.6% was produced in Denver, Colorado, just outside the area. (Pre-Trial Order, pp. 47-49, 65-68).

24. Over 94% of the beer produced in the Eight Western States in 1963 was sold in that area. (Pre-Trial Order, pp. 47-49, 65-68).

25. The Eight Western States area is the principal marketing territory for General Brewing; about 90% of its sales are concentrated there. (Tr. 451, lines 6-11; Tr. 475, lines 15-25).

26. National brewers have, or, in the case of Schlitz, have had in the recent past, separate sales organizations to handle the western market. The great majority of brewers recognize the existence of a western market for beer. (Tr. 584, line 10; Tr. 199, lines 13-17; Tr. 1334, lines 10-14; Tr. 200, lines 5-12; Plaintiff's Exhibit 1, pp. 9-10).

27. The Eight Western States area is a separate geographic market for the production and sale of beer. (Findings 18-26, inclusive).

28. The State of California is an area of heavy production and consumption of beer. During the period between 1947 and 1963, consumption of beer in California has increased six times as much as the nationwide increase in consumption of beer. In 1963, California accounted for about 8% of the total amount of beer consumed in the United States. (Pre-Trial Order, pp. 13, 14, 46, 48, 64).

29. The State of California is an area of intense competition in the sale of beer. (Pre-Trial Order, pp. 14-46; Tr. 487, lines 1-8; Tr. 1360-1361; Tr. 960, line 20—961, line 3).

30. Approximately 60% of General Brewing's sales are made in the State of California. Prior to its acquisition by Schlitz, approximately 96% of Burgermeister's sales were made in the State of California. (Tr. 451, lines 3-5; Tr. 89, lines 20-23).

31. The State of California is recognized by the brewing industry as a separate sub-market for the production and sale of beer. (Tr. 112, line 16; Tr. 197, line 9; Tr. 313, line

18; Tr. 337, line 25; Tr. 456, line 15—457, line 6; Tr. 1888, lines 6-19; Tr. 338, lines 7-17).

32. The State of California is an integrated, homogeneous market for the production and sale of beer. (Tr. 110, lines 15-19).

33. The State of California is a separate geographic sub-market for the production and sale of beer. (Findings 28-31, inclusive).

34. The State of Hawaii is geographically isolated from the continental United States, and it has a unique group of beer consumers whose local pride requires special marketing techniques. (Tr. 457, lines 10-18; Tr. 1336, lines 14-17).

35. Approximately 6% of General Brewing's sales are made in Hawaii. This represented about 41.2% of the total amount of beer sold in Hawaii in 1963. (Tr. 476, lines 15-17; Plaintiff's Exhibit 34).

36. The State of Hawaii is a separate market for the sale of beer. (Tr. 457, lines 10-17).

37. The State of Hawaii is a separate geographic submarket for the production and sale of beer. (Findings 34-36, inclusive).

Issues Generated By The Schlitz Acquisition of An Interest in Labatt

6. Will the reasonably probable effect of the acquisition by defendant Jos. Schlitz Brewing Company of stock of John Labatt Limited be substantially to lessen competition or to tend to create a monopoly in an appropriate line of commerce in one or more of the relevant sections of the country?

7. Will the reasonably probable effect of the indirect acquisition of an interest in General Brewing Corporation by defendant Schlitz be substantially to lessen

competition or to tend to create a monopoly in an appropriate line of commerce in one or more relevant sections of the country?

8. Is John Labatt Limited a corporation engaged in commerce within the meaning of Section 7 of the Clayton Act?

9. Was the purchase of stock of John Labatt Limited by defendant Jos. Schlitz Brewing Company solely for the purpose of making an investment in Canada?

10. Is the acquisition of a stock interest in John Labatt Limited by defendant Schlitz an investment exempt from the prohibition of Section 7 of the Clayton Act?

38. Defendant Schlitz is the Nation's second largest brewer, with 1964 sales of $311,394,654 and with seven breweries located throughout the country. From 1954 to 1964, its share of the California market rose (with some intermediate ebb and flow) from 2.40% to 12.1%. (Pre-Trial Order, pp. 116, 36-46; Plaintiff's Exhibit 11).

39. In February 1964, Schlitz acquired 39.3% of the stock of John Labatt Limited, a sufficient amount for voting control of the latter. (Schlitz Answer to Complaint, p. 5, lines 17-20; Tr. 797, lines 5-11; Plaintiff's Exhibit 11, p. 5).

40. John Labatt Limited is the third largest Canadian brewer, with 1964 sales of $108,585,537 and with seven breweries located throughout Canada. (Pre-Trial Order, p. 117; Tr. 633, lines 16-22; Plaintiff's Exhibit 17).

41. John Labatt Limited controls 63.5% of the common stock of General Brewing Corporation. (Pre-Trial Order, p. 117; Defendant Schlitz Exhibit 198).

42. General Brewing was the 14th largest U.S. brewer in 1963, and has two plants in California, one in Washing-

ton, and one in Utah. General Brewing in 1963 ranked second in the California beer market, with 13.7% of sales, second in the Eight Western States market with 13.3% of sales, and first in the Hawaii market with 41% of sales. (Pre-Trial Order, pp. 56, 48, 49, 45, 65-67, 50).

43. A strong trend toward concentration exists in the brewing industry. Since 1952 the number of plants has decreased from 334 to 190 in 1964, and the number of companies has decreased from 307 to 144 in 1964, while tax paid withdrawals have increased from 84,293,646 barrels to 96,247,413 barrels in 1964. (Pre-Trial Order, p. 71; Plaintiff's Exhibit 25).

44. The share of beer sales accounted for by the 10 largest and 25 largest brewers has increased from approximately 40% and 60%, in 1953, to approximately 57% and 82%, in 1963, respectively. (Pre-Trial Order, pp. 57-58; Plaintiff's Exhibits 26, 27).

45. The rank and market share of each of the 25 largest sellers of beer in the United States in each of the years 1939-1963 is shown in Appendix A hereof. (Pre-Trial Order, pp. 51-58).

46. A trend toward concentration also exists in the Eight Western States area and in California. (Pre-Trial Order, pp. 62, 75; Plaintiff's Exhibits 28, 30).

47. The trend toward concentration in the beer industry will continue unabated. (Tr. 328, line 22—329, line 10; Tr. 590, lines 7-10; Tr. 408, line 3—409, line 1).

48. Acquisitions and mergers have played an important part in the trend toward concentration in the brewing industry. A substantial number of these acquisitions and mergers involved the largest brewers and a majority were of

regional firms in the larger size categories, which stand the best chance for independent survival. Schlitz has made many of these acquisitions. (Pre-Trial Order, pp. 118-127; Defendant Schlitz Exhibit 192; Tr. 2099, line 23—2100, line 4).

49. It is extremely difficult for a new firm to enter the United States brewing industry due to the great expense of buying or building a plant and acquiring sufficient business to support it. The present cost of building a million barrel brewing facility is between $30,000,000 and $35,000,000. So far as the record discloses, just one brewery, Carlings of Canada, has successfully entered the industry in the United States since 1947. (Tr. 409, line 7—411, line 21; Tr. 190, line 15—192, line 3).

50. Control of General Brewing by Schlitz will give Schlitz over 10% of the national beer market, raising it from second to first ranked, and will give the two largest brewers over 20% of the national beer market. (Pre-Trial Order, pp. 51-58).

51. The market share of each major seller of beer in the Eight Western States in 1963 and the total sales of beer in the Eight Western States in 1963 are shown in Appendix B hereof. (Pre-Trial Order, pp. 65-68; Plaintiff's Exhibit 53).

52. The tax paid withdrawals of each brewery operated in the Western States, for each of the years 1960 through 1963, inclusive, are set forth by State at pages 48 and 49 of the Pre-Trial Order, in evidence. (Pre-Trial Order, pp. 48-49).

53. Control of General Brewing by Schlitz will enhance the trend of acquisitions and mergers in the brewing industry and will substantially increase concentration in the brewing industry nationally, in the Eight Western States,

in California, and in Hawaii. (Pre-Trial Order, pp. 51-59, 48-49, 65-67, 14-46, 50; Plaintiff's Exhibits 26-30, 32-34; Tr. 605, lines 12-13).

54. The market share of each major seller of beer in California and total beer sales, for each of the years 1933 through 1964, inclusive, is shown in Appendix C hereof. (Pre-Trial Order, pp. 11-46).

55. Control of General Brewing by Schlitz will give Schlitz six breweries, 22.9% of production, 23% of sales in the Eight Western States, making Schlitz the largest seller of beer in the area. (Pre-Trial Order, pp. 48-49, 65-67; Plaintiff's Exhibit 29).

56. Control of General Brewing by Schlitz will give Schlitz 38.9% of production and 26.8% of sales in California, making it the largest seller of beer in that state, and nearly twice as large as the second ranked firm. (Pre-Trial Order, pp. 48-49, 45; Plaintiff's Exhibits 32, 33).

57. The market share of each seller of beer in Hawaii and total sales of beer in Hawaii for each of the years 1961, 1962 and 1963 are shown in Appendix D hereof. (Pre-Trial Order, p. 50).

58. Control of General Brewing by Schlitz will give Schlitz 50.9% of beer sales in Hawaii. (Pre-Trial Order, p. 50; Plaintiff's Exhibit 34).

59. Distributors (also referred to as wholesalers) are extremely important to successful competition of brewers in the brewing industry. Control of General Brewing by Schlitz will place General's distributor "system" in Schlitz' hands and will result in a significant competitive advantage to Schlitz and a substantial competitive disadvantage to its competitors. (Tr. 335, lines 7-15; Tr. 347, line 7—350, line 3; Tr. 352, line 15—359, line 8; Tr. 212, lines 13-24; Tr. 213,

line 24—214, line 1; Plaintiff's Exhibit 45; Tr. 217, line 19—218, line 1; Tr. 490, lines 1-3; Tr. 158, lines 13-25).

60. Control of General Brewing by Schlitz will result in a substantial lessening of competition in the sale of beer in the United States, the Eight Western States, the State of California, and the State of Hawaii. (Tr. 489, lines 17-24; Tr. 352, lines 15-19; Findings 38-67).

61. At the time Schlitz purchased its stock in John Labatt Limited, Labatt and General Brewing had formulated and partially put into effect plans to expand General Brewing eastward to become a national brewer. (Tr. 463, lines 2-25; Tr. 464, lines 6-19; Tr. 715, line 25—716, line 3; Tr. 780, line 3—782, line 13).

62. The plans of Labatt and General Brewing are based on General's need to overcome its natural disadvantages as a regional brewer, and Labatt's need and desire to market in the United States to meet the advertising spill-over advantage currently possessed by its largest competitor, Canadian Breweries Ltd. (Pre-Trial Order, p. 69; Tr. 462, line 12—463, line 1; Tr. 632, line 19—635, line 15).

63. In connection with the plans to expand General Brewing, and also in its role as the parent corporation, Labatt has given extensive practical and technical assistance to General Brewing of great value to the latter. (Tr. 635, lines 14-16; Tr. 703, line 2—708, line 21; Tr. 470, lines 17-19).

64. Labatt has also helped General Brewing to introduce a premium priced beer under the Labatt brand which General Brewing executives felt was needed. (Tr. 709, line 17—710, line 23; Tr. 1185, lines 7-24; Tr. 1613, line 23—1614, line 13).

65. At the time of its acquisition of Labatt stock, Schlitz

attempted to eliminate potential competition of Labatt by attempting to halt the introduction of Labatt beer into the United States by General Brewing. (Tr. 711, line 18—712, line 15; Plaintiff's Exhibit 7).

66. Labatt and General Brewing's plans represent substantial potential competition in the United States, the Eight Western States and California which will be eliminated if Schlitz is allowed to control Labatt. (Findings 60-65, *supra*).

67. Schlitz' acquisition of stock of Labatt will result in a substantial lessening of actual and potential competition, and will tend to create a monopoly, in the production and sale of beer in the United States as a whole, the Eight Western States, the State of California, and the State of Hawaii. (Findings 38-66, *supra*).

68. John Labatt Limited each year sells approximately $2,000,000 worth of beer in 20 States of the United States, located for the most part in the Midwest and eastern portions of the United States. This beer is produced in Labatt's Canadian breweries. (Tr. 783, line 2; Tr. 784, lines 2-5; Plaintiff's Exhibit 12).

69. To facilitate these sales, Labatt has organized a distribution system in the United States composed of two master distributors and a number of local distributors. (Tr. 784, lines 8-13).

70. In order to stimulate sales of its beer in the United States, Labatt provides advertising allowances, finances shared advertising programs, and makes partial payment of salesmen's salaries. (Tr. 788, line 16—790, line 4).

71. Labatt sales in the United States are supervised by Labatt's export manager, who spends one-third to one-half

of his time in the United States working with the master distributors and local distributors. (Tr. 786, line 24—788, line 9).

72. Approximately 20% to 25% of the Labatt beer sold in the United States is shipped to the United States on Labatt-owned trucks. (Tr. 786, lines 4-6).

73. Orders for Labatt beer are placed by telephone by United States distributors to the brewery, sometimes as frequently as daily. (Tr. 785, lines 9-12).

74. Labatt deals directly with government agencies in the United States in obtaining approval for marketing its beer in the United States. (Tr. 790, line 5—791, line 4).

75. The continuous flow of Labatt beer from Canada to Labatt's distributors in the United States constitutes an engagement in foreign and interstate commerce by John Labatt Limited. (Tr. 783-790).

76. John Labatt Limited engages in commerce in the United States through its control of, and close business relationship with and assistance to, General Brewing Corporation. (Tr. 703, line 2—708, line 21; Pre-Trial Order, p. 117, lines 4-9).

77. From the outset of the negotiations Schlitz sought working control of John Labatt Limited. But for the issuance of the temporary restraining order, Schlitz obtained and would now have such control. (Tr. 1103, line 4; Tr. 1315, line 2; Tr. 717, lines 15-18; Tr. 824, lines 3-16).

78. Schlitz purchased 1,700,000 shares, or 39.3% of the Labatt stock at $23 (Canadian) a share at a price which was described to Labatt shareholders as "an historically high level" and one appearing "to discount future growth of the Company [Labatt] for some years." (Plaintiff's Exhibit 22).

79. Schlitz was correctly advised by the Labatt management that its acquisition of Labatt stock would meet with an adverse reaction from the Canadian public. (Tr. 719, lines 14-22; Tr. 765, line 6—766, line 13).

80. During the course of negotiations for Schlitz' acquisition of a controlling interest in Labatt, both parties recognized the possible anti-competitive consequences of consummation. (Tr. 718, line 9—722, line 6).

81. The possibility of Labatt management marketing Schlitz brand beer was discussed but never resolved between Labatt and Schlitz. (Tr. 817, line 21—819, line 7).

82. During the course of negotiations Schlitz sought to dissuade Labatt from introducing the Labatt brand of beer through General Brewing. (Tr. 711, line 18—713, line 17; Plaintiff's Exhibit 7).

Issues Generated By The Schlitz Acquisition of Burgermeister

11. May plaintiff challenge in these proceedings the acquisition of the assets of Burgermeister Brewing Corporation by defendant Schlitz?

12. Was Burgermeister Brewing Corporation a failing firm?

13. Will the reasonably probable effect of the acquisition by defendant Schlitz of all of the assets, except cash, of Burgermeister Brewing Corporation be substantially to lessen competition or to tend to create a monopoly in an appropriate line of commerce in one or more of the relevant sections of the country?

83. Shortly before the acquisition of Burgermeister by Schlitz, the Department of Justice requested Schlitz to submit detailed information concerning the transaction; in

response, Schlitz submitted certain information concerning its acquisition of Burgermeister and relating to the business of each of the companies; after consideration of the information submitted by Schlitz, counsel for Schlitz was advised that the Department of Justice was not prepared to take any action at that time to block the Schlitz acquisition of Burgermeister; the Department of Justice took no action at that time to block the Schlitz acquisition of Burgermeister. (Defendant Schlitz Exhibits 52, 207; 53A-P, 207).

84. Defendant Schlitz did not submit a written request for written clearance of its acquisition of Burgermeister; (The record is barren of any proof that the Department of Justice gave clearance to the acquisition of Burgermeister by defendant Schlitz). (Defendant Schlitz Exhibit 207).

85. Defendant Schlitz requested and obtained clearance letters from the Department of Justice for its acquisition of the Hawaii Brewing Company and a Puerto Rican brewery. (Tr. 1312, line 10—1313, line 3).

86. Oral clearances for mergers or acquisitions are not given by the Antitrust Division. (Tr. 1781, line 2—1782, line 17).

87. The sales by dollar and volume and after-tax earnings by Burgermeister in the five years preceding its acquisition were as follows:

Year	Sales	Volume (barrels)	After-Tax Earnings
1957	$37,319,900	973,501	$1,013,829
1958	37,221,851	971,502	988,823
1959	38,197,664	974,347	944,687
1960	35,554,000	892,711	720,951
1961	29,154,891	726,533	408,602

(Pre-Trial Order, pp. 43, 116; Plaintiff's Exhibits 3, 4; Defendant Schlitz Exhibits 53K, 53L).

88. In 1960, Burgermeister was the third largest selling California brewery accounting for 10.7% of all beer sold in the State of California. (Pre-Trial Order, p. 42).

89. Burgermeister's one brewery, located in San Francisco, California, was completely rebuilt during the period from 1944 to 1948. (Tr. 89, lines 3-13).

90. In 1960 Burgermeister had one of the most modern plants, equipped with the finest draft beer equipment, in the United States. (Tr. 89, lines 14-16; Tr. 105, lines 21-24).

91. At the time of its acquisition by Schlitz, Burgermeister had an exceptionally strong distributor organization. (See Finding 59 as to the great value of this.) (Tr. 95, lines 19-23; Tr. 158, lines 5-10; Tr. 188, lines 8-9).

92. 1960 was the twenty-first consecutive year in which Burgermeister Brewing Corporation paid dividends to its shareholders. (Plaintiff's Exhibit 4, p. 2).

93. At the time its assets were purchased by Schlitz, Burgermeister Brewing Corporation had no long-term outstanding debts. (Plaintiff's Exhibit 4, p. 5).

94. At the time its assets were purchased by Schlitz, Burgermeister Brewing Corporation was a solvent corporation in a healthy financial position. (Plaintiff's Exhibits 3, 4; Tr. 105, lines 10-24; Tr. 1543, line 16—1544, line 22).

95. At the time its assets were purchased by Schlitz, Burgermeister Brewing Corporation was not in a deteriorating or declining condition nor could it be termed a failing plant. (Plaintiff's Exhibits 3, 4; Tr. 187, line 25—188, line 9; Tr. 2065, lines 3-6).

96. In 1960 Miller Brewing Company offered to purchase Burgermeister for $11,000,000. This offer was raised

to $12,000,000 in March of 1961. (Tr. 160, lines 7-8; Tr. 169, lines 5-8; Tr. 187, lines 4-11).

97. On December 29, 1961, defendant Schlitz purchased the assets of Burgermeister, except for cash in the amount of $1,700,000, for $12,039,250. (Plaintiff's Exhibit 1, p. 3).

98. Had Burgermeister in 1961 spent its usual amount for advertising, including point-of-purchase advertising and service costs, the net earnings for 1961 would have been over one million dollars. (Tr. 104, lines 12-19; Tr. 139, lines 1-25).

99. From 1948 to 1961 several national brewers who had no brewing facilities in California, acquired California breweries. (Pre-Trial Order, pp. 12, 13, 40-43, 120, 121).

100. The volume and market share of firms brewing or selling beer in California for the years 1955 through 1964, inclusive, are shown at pages 37-46 of Appendix C hereof. (Pre-Trial Order, pp. 37-46).

101. For the years 1955 through 1960, Burgermeister's sales in California, its rank and its percentage of the California market were as follows:

Year	Calif. Sales (barrels)	Rank	Percent of Market
1955	977,561	2	16.12
1956	943,762	2	14.97
1957	887,798	3	13.53
1958	886,359	3	12.78
1959	887,106	4	11.93
1960	805,289	3	10.7

(Pre-Trial Order, pp. 37-42).

102. For the years 1955 through 1960, Schlitz sales in California, its rank and its percentage of the California market were as follows:

Year	Calif. Sales (barrels)	Rank	Percent of Market
1955	243,190	9	4.01
1956	264,860	9	4.20
1957	283,692	9	4.32
1958	273,331	10	3.94
1959	292,559	10	3.94
1960	293,238	11	3.9

(Pre-Trial Order, pp. 37-42).

103. The dollar value of beer sales by Burgermeister Brewing Corporation for each of the years 1957 through 1960 in each of the States in which it sold are shown on Appendix E hereof. (Plaintiff's Exhibit 5).

104. 1961 sales for Burgermeister are not reliable indicia of the effect of the Schlitz acquisition of the Burgermeister assets because such sales were seriously distorted by the demoralizing effect of awareness, in the industry, its distributors and corporate personnel, of negotiations for the sale of Burgermeister which commenced in 1960. (Tr. 104, line 4—105, line 4; Tr. 1544, lines 3-11).

105. In 1961 Schlitz was the tenth ranking brewer in California and had 3.6% of the California market. In 1962 Schlitz was the third ranking brewer in California and had 12.3% of the California market. (Pre-Trial Order, pp. 43, 44).

106. At the time of its acquisition by Schlitz, Burgermeister was a substantial independent competitor in California. (Tr. 497, lines 14-16; Tr. 1620, lines 5-8; Pre-Trial Order, pp. 42, 43).

107. After Schlitz acquired Burgermeister, Schlitz attempted to have its wholesalers carry a full line of Schlitz products. (Tr. 1270, lines 7-13).

108. When Schlitz acquired Burgermeister, it was able to choose between the Schlitz and the Burgermeister wholesaler. Schlitz thus was able to strengthen its wholesaler organization by choosing the more effective of the two wholesalers. (Plaintiff's Exhibit 2).

109. In the first six months following the acquisition of Burgermeister by Schlitz, Schlitz terminated on its own initiative its relationship with thirty-nine beer distributors in various market areas of the West. Fourteen of these were former Burgermeister distributors, and twenty-five of these were former Schlitz distributors. Eight of the fourteen former Burgermeister distributors were in California, and twenty-three of the twenty-five former Schlitz distributors were in California. (Answer of Defendant Jos. Schlitz Brewing Company to Plaintiff's First Set of Interrogatories to Said Defendant, pp. 55-76).

110. Schlitz' ability to choose between the Schlitz and Burgermeister wholesaler when it acquired Burgermeister caused substantial detriment to other brewers whose beers were formerly being sold by either the Schlitz or Burgermeister wholesaler. (Tr. 1609, lines 5-19; Tr. 1611, lines 20-25; Tr. 493, line 17—493A, line 2; Tr. 188, line 25—190, line 14; Tr. 220, line 8—222, line 20; Tr. 290, line 14—292, line 6).

111. General Brewing Company and Miller Brewing Company are two examples of breweries who were detrimentally affected by the Schlitz acquisition of Burgermeister in that their distributor organizations were disrupted. (Tr. 1203, lines 2-7; Tr. 1226, lines 3-14; Tr. 190, lines 2-14; Tr. 205, lines 6-12; Tr. 212, line 3—214, line 16; Tr. 226, lines 11-19).

112. At the time of the Schlitz acquisition of Burgermeister, Miller Brewing Company had twenty-two joint

distributors with Burgermeister. After the acquisition, six of these dropped Miller and took on Schlitz, six dropped Burgermeister and stayed with Miller, two went out of business after having Burgermeister withdrawn from them, four took on Schlitz and retained Miller, and four did not take on Schlitz. (Tr. 188, line 25—189, line 10; Tr. 220, line 8—222, line 20).

113. At the time of its acquisition of Burgermeister, Schlitz was distributing its popular priced beer, Old Milwaukee, in the middle west, southern, and southeastern States. (Tr. 1252, lines 5-17).

114. Old Milwaukee's marketing area has been expanded so that it is now being sold in substantially every other State where Burgermeister is not presently marketed. (Tr. 1304, line 24—1305, line 9).

115. Since its acquisition of Burgermeister, Schlitz has succeeded in expanding Burgermeister's selling area eastward until it has met that of Old Milwaukee. (Tr. 1346, line 21—1347, line 6).

116. In 1961 Schlitz was aware that in order to improve its position on the West Coast, it could either introduce its own popular priced brand or acquire a going brand. (Plaintiff's Exhibit 2, pp. 2, 3).

117. It would have been very costly for Schlitz to introduce its own brand on the West Coast in 1961. (Plaintiff's Exhibit 2, p. 2).

118. But for its acquisition of the Burgermeister assets, Schlitz would have introduced its own popular priced beer on the West Coast. (Plaintiff's Exhibit 2).

119. The changes in its distributor organization that Schlitz effectuated after it acquired the assets of Burger-

meister resulted in a substantial lessening of competition and a tendency to create a monopoly in the production and sale of beer in the Eight Western States area and in California. (Findings 107-112, *supra*).

120. The failure of Schlitz to introduce its own popular priced brand beer into the West Coast because of its acquisition of the assets of Burgermeister resulted in a substantial lessening of actual and potential competition and a tendency to create a monopoly in the production and sale of beer in the Eight Western States area and in California. (Findings 113-118, *supra*).

121. The elimination of Burgermeister as a substantial independent competitor by Schlitz' purchase of the assets of Burgermeister resulted in a substantial lessening of competition and a tendency to create a monopoly in the production and sale of beer in the Eight Western States area and in California. (Findings 95, 106, *supra*).

122. The purchase of the assets of Burgermeister by Schlitz further enhanced the trend toward concentration in the brewing industry, resulting in a substantial lessening of competition and a tendency to create a monopoly in the production and sale of beer in the Eight Western States area and in California. (Findings 43-49, 99, *supra*).

123. The acquisition of the assets of Burgermeister by Schlitz resulted in a substantial lessening of actual and potential competition and a tendency to create a monopoly in the production and sale of beer in the Eight Western States area and in California. (Findings 99-118, *supra*).

124. The evidence was not sufficient to establish that the Schlitz acquisition of Burgermeister resulted in a substantial lessening of competition, actual or potential, nor in a tendency to create a monopoly in the production and sale of beer in the United States or in Hawaii.

125. The acquisition by Schlitz of the assets of Burgermeister, in connection with Schlitz' subsequent acquisition of Labatt stock and thereby control of General Brewing, is further evidence of the continuing trend toward concentration in the brewing industry in general and of the attempts by Schlitz, in particular, to increase its sales and market share by the acquisition of competitors. (Findings 38, 43, 44, 45, 46, 47, 48, 50, 53, 59, 65, 80, 82, 85, 97, 104, 105, 106, 107, 109, 111, 112, 118, 119-24).[2]

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2. The Pre-Trial Order, under the heading "Purposes of Defendant Schlitz", stated Issues 14 and 15 as follows. "14. If the evidence adduced at trial shows that the acquisition of a stock interest in John Labatt Limited by defendant Schlitz was for the purpose of participating in the Canadian market, is this a transaction subject to Section 7 of the Clayton Act? 15. Is the acquisition by defendant Schlitz of a stock interest in John Labatt Limited subject to Section 7 of the Clayton Act regardless of the purpose of the acquisition?" As to Issue 14, Schlitz did adduce some evidence in support of the claim that its acquisition of the stock interest in Labatt was for the purpose of participating in the Canadian market. But it was not convincing evidence. As the Findings show, the focus of Schlitz' interest in the acquisition was really in connection with the United States market and areas therein. In any case, the issue posed by 14 is ultimately one of law and the law is clear that even if *the* purpose of Schlitz, or *a* purpose of Schlitz, was for participation in the Canadian market, that would not immunize against the proscriptions of Section 7 of the Clayton Act. As to Issue 15, the only "purpose" which might have justified the acquisition under the provisions of Section 7 of the Clayton Act would have been purchase of the Labatt stock "solely for investment" as provided and spelled out in the statute. There is no credible evidence to support any claim that the Schlitz purchase of Labatt stock was "solely for investment" and the claim, if made by Schlitz, appears to have been abandoned.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the subject matter of the complaint herein and the parties hereto.

2. The production and sale of beer is a line of commerce within the meaning of Section 7 of the Clayton Act, the relevant provisions of which are set forth in Appendix F hereof. Beer is the appropriate product market for determining the effects on competition of the acquisitions by defendant Jos. Schlitz Brewing Company of the assets of Burgermeister Brewing Corporation and of stock of John Labatt Limited.

United States v. *Continental Can Co.*, 378 U.S. 441, 456-57 (1964).

Brown Shoe Co. v. *United States*, 370 U.S. 294, 325-26 (1962).

United States v. *E. I. duPont de Nemours & Co.*, 353 U.S. 586, 593-95 (1957).

A. G. Spalding & Bros., Inc. v. *Federal Trade Commission*, 301 F.2d 585, 604 (3rd Cir. 1962).

Crown Zellerbach Corporation v. *Federal Trade Commission*, 296 F.2d 800, 811 (9th Cir. 1961), *cert. den.*, 370 U.S. 937 (1962).

American Crystal Sugar Co. v. *Cuban-American Sugar Co.*, 259 F.2d 524, 529-30 (2d Cir. 1958).

Hamilton Watch Co. v. *Benrus Watch Co.*, 114 F. Supp. 307, 311 (D. Conn. 1953), *affirmed*, 206 F.2d 738 (2d Cir.).

3. There are no distinguishable price levels of beer which constitute relevant product sub-markets within the line of commerce found by the Court and designated as the production and sale of beer.

United States v. *Continental Can Co.*, 378 U.S. 441, 456-57 (1964).

Brown Shoe Co. v. *United States*, 370 U.S. 294, 325-26 (1962).

Hamilton Watch Co. v. *Benrus Watch Co.*, 114 F. Supp. 307, 311 (D. Conn. 1953), *affirmed*, 206 F.2d 738 (2d Cir.).

4. The following areas are each sections of the country for the production and sale of beer, within the meaning of Section 7 of the Clayton Act, and each is a relevant geographic market to be considered in determining the effects on competition of the acquisitions challenged by the complaint:

the United States;
the Eight Western States of California, Oregon, Washington, Idaho, Montana, Nevada, Utah and Arizona;
the State of California;
the State of Hawaii.

United States v. *El Paso Natural Gas Co.*, 376 U.S. 651, 657 (1964).

United States v. *The Philadelphia National Bank*, 374 U.S. 321, 357, 360-61 (1963).

Brown Shoe Co. v. *United States*, 370 U.S. 294, 336-37 (1962).

Crown Zellerbach Corporation v. *Federal Trade Commission*, 296 F.2d 800, 817 (9th Cir. 1961), *cert. den.*, 370 U.S. 937 (1962).

American Crystal Sugar Co. v. *Cuban-American Sugar Co.*, 152 F. Supp. 387, 398 (S.D.N.Y. 1957), *affirmed*, 259 F.2d 524 (2d Cir. 1958).

United States v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 599-603 (S.D.N.Y. 1960).

5. The reasonably probable effect of the acquisition by defendant Jos. Schlitz Brewing Company of stock of John Labatt Limited (and thereby control of General Brewing Company) will be substantially to lessen competition and

to tend to create a monopoly in the production and sale of beer in the United States as a whole, the Eight Western States, the State of California, and the State of Hawaii.

United States v. *Aluminum Co. of America,* 377 U.S. 271 (1964).

United States v. *Continental Can Co.,* 378 U.S. 441 (1964).

United States v. *Penn-Olin Chemical Co.,* 378 U.S. 158 (1964).

United States v. *El Paso Natural Gas Co.,* 376 U.S. 651 (1964).

United States v. *The Philadelphia National Bank,* 374 U.S. 321 (1963).

Brown Shoe Co. v. *United States,* 370 U.S. 294 (1962).

American Crystal Sugar Co. v. *Cuban-American Sugar Co.,* 152 F. Supp. 387 (S.D.N.Y. 1957), *affirmed,* 259 F.2d 524 (2d Cir. 1958).

United States v. *Bethlehem Steel Corp.;* 168 F. Supp. 576 (S.D.N.Y. 1960).

6. John Labatt Limited is a corporation engaged in commerce within the meaning of Section 7 of the Clayton Act.

Clayton Act, Section 1, 38 Stat. 730 (15 U.S.C. §12).

7. The acquisition of a stock interest in John Labatt Limited by defendant Schlitz is not an investment exempt from the prohibition of Section 7 of the Clayton Act.

Hamilton Watch Co. v. *Benrus Watch Co.,* 114 F. Supp. 307, 316 (D. Conn. 1953), *affirmed,* 206 F.2d 738 (2d Cir.).

8. The Department of Justice may challenge the acquisition of Burgermeister Brewing Corporation by defendant

Schlitz in this proceeding and is not estopped or restrained from doing so by its failure to bring suit at the time of the acquisition.

United States v. *New Orleans Chapter, Associated General Contractors of America, Inc.*, 382 U.S. 17 (1965), *reversing* 238 F. Supp. 273 (E.D.La. 1964).

United States v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 226 (1940).

United States v. *Grinnel Corporation*, 30 F.R.D. 358, 363 (D. R.I. 1962).

9. At the time of its acquisition by defendant Schlitz, Burgermeister Brewing Corporation was not a failing firm.

International Shoe Co. v. *Federal Trade Commission*, 280 U.S. 291, 301-02 (1929),

Erie Sand and Gravel Company v. *Federal Trade Commission*, 291 F.2d 279, 280-81 (3rd Cir. 1961).

10. The acquisition of all of the assets, except cash, of the Burgermeister Brewing Corporation by defendant Schlitz had, and continues to have, the reasonably probable effect of substantially lessening competition and tending to create a monopoly in the production and sale of beer in the Eight Western States area and in the State of California. Such lessening of competition was and is actual competition in the State of California and primarily potential competition in the Eight Western States area.

United States v. *Aluminum Co. of America*, 377 U.S. 271 (1964).

United States v. *Continental Can Co.*, 378 U.S. 441 (1964).

United States v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964).

United States v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964).

United States v. *The Philadelphia National Bank*, 374 U.S. 321 (1963).

Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962).

American Crystal Sugar Co. v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *affirmed*, 259 F.2d 524 (2d Cir. 1958).

United States v. *Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y. 1960).

11. The acquisition of the assets, except cash, of the Burgermeister Brewing Corporation by defendant Jos. Schlitz Brewing Company, as charged in the complaint herein, violated Section 7 of the Clayton Act.

12. The acquisition of stock of John Labatt Limited by defendant Jos. Schlitz Brewing Company, as charged in the complaint herein, violated Section 7 of the Clayton Act.

13. The relief necessary to accomplish the alleviation of the unlawful effects of the violations found herein will be the divestiture by defendant Schlitz of the assets of Burgermeister Brewing Corporation and of the stock of John Labatt Limited.

14. Such relief will require appropriate exercise of the injunctive power of this court upon defendant Jos. Schlitz Brewing Company and defendant General Brewing Company.

COMMENTS ON THE FINDINGS OF FACT PROPOSED BY DEFENDANT JOS. SCHLITZ BREWING CO.

The proposed Findings of Fact submitted by the defendant Schlitz were closely examined and carefully considered by the trial court. In the main, Schlitz' Findings have been rejected, because in their most important aspects, they are not supported by the evidence. No attempt is here made to detail the reasons for this conclusion as to each and every Finding of Fact proposed by Schlitz. Instead, the following comments serve to point out the major areas of disagreement between the court's view of the evidence and of the applicable law as contrasted to those urged by defendant Schlitz.

The Relevant Line of Commerce

Schlitz maintains that premium and non-premium beer constitute separate lines of commerce within the meaning of Section 7 of the Clayton Act. This conclusion is grounded largely on the assumptions that there is a clear price differential between premium and non-premium beer and that sales of premium beer have held a constant 20% of the national beer market.

Insofar as Schlitz' conclusion is based on a price differential between premium and non-premium beer, it is not supported by the evidence nor by the applicable case law. The trial court has found that in California, beer prices range over a wide spectrum from $.79 to $1.44 a six-pack. There is no rational way of choosing a point along this price spectrum and saying that all beer which sells above that point constitutes a line of commerce, or even a submarket, apart from all beer which sells below that point. This is precisely what the Supreme Court refused to do in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 325-26 (1962), when it rejected the defendant's position that

medium-price and low-price shoes constituted separate lines of commerce for purposes of Section 7. In fact, an examination of the criteria listed by the Supreme Court in *Brown Shoe* and the evidence adduced here on the issue of the relevant line of commerce shows that each and every factor mentioned in the Supreme Court's opinion points toward a finding that all beer is the only relevant line of commerce in the present case.[3]

This conclusion is not vitiated by a showing that some percentage of beer consumers will purchase only premium, or only non-premium beer. Even Schlitz admits that there is "an area in which consumers cross over from premium to non-premium beers." (Schlitz Proposed Finding of Fact No. 132). This conclusion was expressed almost unanimously by the witnesses from the brewing industry. In *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964), the Supreme Court held that the government could establish that metal and glass containers constituted a single line of commerce without proving that the area of competitive overlap between them was complete. The Court said:

> "There may be some end uses for which glass and metal do not and could not compete, but complete inter-industry competitive overlap need not be shown. We

3. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for anti-trust purposes. . . . The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." 370 U.S. at 325.

> would not be true to the purpose of the Clayton Act's line of commerce concept as a framework within which to measure the effect of mergers on competition were we to hold that the existence of noncompetitive segments within a proposed market area precludes its being treated as a line of commerce." 378 U.S. at 457.

Clearly, there is at least as great a "competitive overlap" between premium and non-premium beers as between metal and glass containers. Furthermore, the testimony establishes conclusively that this competition for the beer consumers' dollar is reflected in competition among *all* beers for shelf space, servicing at retail outlets and point-of-sale advertising space.

The Relevant Section of the Country

Schlitz insists that the entire United States is the only relevant section of the country in this case. It contends that to quench their thirst, consumers can and do turn to brewers located anywhere in the nation. However, Schlitz seems to overlook the fact that only three brewers—Schlitz, Miller and Anheuser-Busch—actually compete on a national basis. The competitive "mix" of suppliers in the beer industry in any area or section of the country is composed of the three national brewers and a group of local and regional brewers. The evidence in this case shows that freight rates and population density and growth are among the most important factors relied upon by local and regional brewers in determining their geographic markets. Freight rates for shipping beer across the Continental Divide strongly support the conclusion that the Eight Western States area is a relevant section of the country; the population density and growth of California strongly supports the conclusion that it is a relevant section of the

country. Furthermore, both of the acquired American breweries made at least 90% of their sales in California or in the Eight Western States area.

In much quoted language in its *Brown Shoe* decision, the Supreme Court said that "the geographic market must . . . both 'correspond to the commercial realities' of the industry and be economically significant." 370 U.S. at 336-37. An examination of the brewing industry in general and of the competitors involved here in particular, shows that the trial court's Findings on the relevant sections of the country are completely consistent with the *Brown Shoe* test.

To support its position that the entire United States is the only relevant section of the country, Schlitz points out that the Miller Brewing Co. has only one brewery—in Milwaukee, Wisconsin—and that Miller competes successfully west of the Continental Divide. However, it was established at the trial that Miller sold its beer in California at a price considerably above that of the other "national premiums," Schlitz and Budweiser. It seems clear that Miller would be an even stronger competitor in the West if it could move its beer into western outlets at a lower cost for freight. Apparently, Miller feels this way also, since it has now made a firm offer to purchase General Brewing's Azusa brewery in Southern California.

The Probable Effect on Competition of Schlitz' Acquisition of Labatt and General Brewing

The record supports Schlitz' contention that Labatt is not now a substantial competitor in the United States. However, Schlitz goes further and states that "there is no evidence that Labatt plans to expand its efforts in the United States." (Schlitz Proposed Finding No. 61). This statement is patently erroneous. Both Mr. John H. Moore, President

of John Labatt, Ltd., and Mr. John B. Cronyn, Executive Vice President of John Labatt, Ltd., testified that Labatt did desire and intend to expand its operations into the United States markets and that it intended to use General Brewing as a vehicle for accomplishing this purpose. (Tr. 780, line 13—782, line 13; Tr. 632, line 19—633, line 11; Tr. 635, lines 5-13). The evidence clearly demonstrates that Labatt had the desire, the intention and the resourcefulness to enter the United States markets and to make General Brewing a stronger competitor in those markets.

Schlitz makes much of Labatt's early setbacks in entering the United States markets through its licensing agreement with General Brewing. In *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964), the Supreme Court held that the acquisition of Pacific Northwest Pipeline Corp. by El Paso violated Section 7 of the Clayton Act because Pacific Northwest was a strong *potential competitor* in the California market. The Court pointed out that Pacific Northwest had the desire and the ability to enter this market. El Paso argued that Pacific Northwest had already tried to sell gas in California but had failed. The Court rejected this argument, saying:

> "That might be weighty if a market presently saturated showed signs of petering out. But it is irrelevant in a market like California where incremental needs are booming." 376 U.S. at 660.

It is appropriate to point out that the evidence in the present case shows that California's demand for beer is booming almost as quickly as its demand for gas. Like Pacific Northwest, Labatt is anxious and able to help meet the demand.

Schlitz' position in regard to General Brewing is that Schlitz never wanted control of General Brewing and that Schlitz would use its power as controlling stockholder of Labatt to arrange for a sale of General Brewing. This argu-

ment, even if supported by the evidence, is irrelevant to the issue of whether Schlitz' acquisition of Labatt and General Brewing violated Section 7 of the Clayton Act. "[T]he test of a violation of §7 is whether, *at the time of suit,* there is a reasonable probability that the acquisition is likely to result in the condemned restraints." *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 607 (1957) (emphasis added). At the time of suit, Schlitz did in fact control General Brewing.

Furthermore, even if Schlitz' contention about its intentions vis-a-vis General Brewing is deemed relevant to the issue of the terms of the trial court's decree, the facts of the present case show that the ends of the Clayton Act will not be served by allowing Schlitz to keep Labatt and divest itself of General Brewing. Preliminarily, it should be pointed out that the trial court is not convinced that from the outset of its negotiations with Labatt, Schlitz had no desire to control General Brewing. If this were true, Schlitz could have gone a great deal further in making sale of General Brewing a prerequisite for its purchase of Labatt stock. But, even accepting Schlitz' contention at face value, it is clear that Labatt ownership and support of General Brewing is most likely to maintain, and even increase, competition in United States brewing industry markets.

Entry into American brewing markets by new American firms is highly unlikely, and the large established Canadian brewers represent the most probable sources of potential substantial competition in the United States markets. But, if General Brewing were to be sold by Schlitz, the most likely buyer would be one of the larger American brewing firms. Both of the other large Canadian breweries already have an interest in an American brewing company, and Schlitz probably would not desire to increase the chances of

strong potential competition from Canada. The smaller American brewing companies, on the other hand, probably would not have the resources to purchase General Brewing and give it the necessary financial and technical help needed to reverse its present downward trend. The sale of General Brewing to one of the larger American breweries, or even to a Canadian brewery which already has a substantial interest in the United States brewing industry, might well create new antitrust problems and is, therefore, not at all desirable. See *United States* v. *E. I. du Pont de Nemours,* 366 U.S. 316, 333 (1961).

The Probable Effect on Competition of Schlitz' Acquisition of Burgermeister

Schlitz places great emphasis on what it describes as Burgermeister's deteriorating financial condition. (See, *e.g.,* Schlitz Proposed Findings 16-19, 28). However, the evidence conclusively establishes that Burgermeister was not a failing firm within the doctrine expounded by the Supreme Court in *International Shoe Co.* v. *Federal Trade Commission,* 280 U.S. 291 (1930). Furthermore, as the trial court's Findings point out, Burgermeister had a modern plant, a healthy balance sheet and a strong group of beer wholesalers. Of course, it is true that Burgermeister's sales and profits were declining at the time of the Schlitz acquisition. However, this is undoubtedly true of many firms which decide to sell out to a competitor. Allowing an acquiring company to successfully raise the defense that its acquired former competitor showed declining sales and profits in the years immediately preceding the acquisition surely would provide an exception to Section 7 large enough to eviscerate the statute.

Schlitz asks the trial court to find that there is "no evidence that when a wholesaler adds a new brand to his line

he reduces his efforts on behalf of the other brands he is handling." (Schlitz Proposed Finding No. 46). This argument misses the point. It is clear that most brewers believe that a wholesaler needs a full price line of beers in order to compete most effectively. (Tr. 430, lines 17-22; Tr. 246, line 24—247, line 2; Tr. 303-304; Tr. 615, line 17—616, line 11). Furthermore, most brewers would like to have wholesalers who handle only their products, and there is a trend in this direction in the beer industry. (Tr. 245, lines 5-16; Tr. 1573-1574; Tr. 302, lines 5-16). When a brewer like Schlitz acquires a full price line of beers, it is in a position to select the most effective wholesalers of these beers and to require these wholesalers to carry the full line of Schlitz products. The evidence shows that the wholesalers selected by Schlitz will concentrate their efforts on Schlitz products, while those who have lost either Burgermeister, General Brewing's Lucky Lager, or Schlitz, will be less effective outlets for other brewers who do not market a full price line of beers. Schlitz carried out this process of selecting the most effective of the Schlitz or Burgermeister wholesalers after it acquired Burgermeister, and it is probable that Schlitz would do the same thing with the General Brewing wholesalers if it were allowed to control General Brewing. Schlitz' potential power in this important aspect of competition in the beer industry is somewhat analogous to the situation in the *Brown Shoe* case. There, in discussing the vertical anti-competitive effects of the Brown-Kinney merger, the Supreme Court noted:

> "[I]t is apparent both from past behavior of Brown and from the testimony of Brown's President, that Brown would use its ownership of Kinney to force Brown shoes into Kinney stores." 370 U.S. at 332.

The Court pointed out that one effect of the merger, therefore, would be to foreclose sections of the market to other shoe manufacturers who sold their shoes in Kinney stores.

Although Schlitz does not "own" the beer wholesalers who sold Burgermeister or who now sell Lucky Lager, it is clear that Schlitz could and did "force" its full line of products into some outlets and take its products away from other outlets. In either case, the wholesalers involved become less effective distributors for the products of other brewers. Thus, the Schlitz acquisitions of both American brewing companies have had and would continue to have serious anti-competitive consequences at the important wholesaler level in the beer industry.

The Court has prepared a Final Judgment and Decree consonant with all of the foregoing. A copy thereof appears as Appendix G.

Dated: March 24, 1966.

STANLEY A. WEIGEL
Judge

APPENDICES A THROUGH F OMITTED

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. **JOS. SCHLITZ BREWING COMPANY and GENERAL BREWING COMPANY,** Defendants.	**Civil Action No. 42127**

FINAL JUDGMENT AND DECREE

Plaintiff, United States of America, having filed its complaint herein on February 19, 1964, defendant Jos. Schlitz Brewing Company having appeared and filed its answer to the complaint denying the substantive allegations thereof, and defendant General Brewing Corporation, sued herein as General Brewing Company, having appeared and filed its answer thereto admitting the substantive allegations thereof, the testimony having been taken at the trial hereof, and the Court having fully considered the matter, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I

(A) This Court has jurisdiction of the subject matter of this action and the parties hereto pursuant to Section 15 of the Act of Congress of October 15, 1914, as amended (15 U.S.C. Section 25).

(B) The acquisition by defendant Jos. Schlitz Brewing Company of the business and assets of Burgermeister

Brewing Corporation, as charged in the complaint herein, constitutes a violation of Section 7 of the Clayton Act (15 U.S.C. Section 18).

(C) The acquisition by said defendant of common capital stock in John Labatt Limited, as charged in the complaint herein, constitutes a violation of Section 7 of the Clayton Act (15 U.S.C. Section 18).

II

As used in this Final Judgment and Decree:

(A) "Person" means any individual, partnership, firm, corporation, association, trustee or other business or legal entity.

(B) "Schlitz" means defendant Jos. Schlitz Brewing Company, its successors and assigns.

(C) "General Brewing" means defendant General Brewing Company, its successors and assigns.

(D) "Burgermeister" means Burgermeister Brewing Corporation prior to December 31, 1961, a corporation organized and existing under the laws of the State of California.

(E) "Labatt" means John Labatt Limited, a Dominion Corporation, organized and existing under the laws of the Dominion of Canada, with its principal office in London, Ontario, Canada.

III

This Final Judgment and Decree is binding upon Schlitz and General Brewing, their respective subsidiaries, affiliates, directors, officers, agents and employees as well as upon all other persons who shall have received actual notice of this Final Judgment and Decree by personal service or otherwise.

IV

(A) Schlitz is permanently enjoined and restrained from acquiring, holding, or exercising any control over, directly or indirectly, any shares of stock of any corporation engaged in the brewing of beer in the State of California or any interest, directly or indirectly, in any brewery facility, plant or other assets of any person engaged in the brewing of beer in the State of California.

(B) For a period of ten (10) years from the date of entry of this Final Judgment and Decree, Schlitz is enjoined and restrained from acquiring, holding or exercising any control over, directly or indirectly, any shares of stock of any corporation engaged in the brewing of beer outside of the State of California or any interest in any brewery facility, plant or other asset of any person engaged in the brewing of beer outside of the State of California except (1) with the prior written consent of the plaintiff herein or (2) if such consent is refused or withheld, after approval by this Court upon an affirmative showing by Schlitz that the effect of the acquisition, holding or control will not be substantially to lessen competition or to tend to create a monopoly in any line of commerce in any section of the country.

(C) For a period of five (5) years after the date of entry of this Final Judgment and Decree, General Brewing is enjoined and restrained from transferring any shares of stock in General Brewing owned by Labatt, Capital Estates, Inc., or Lucky Lager Breweries, Ltd., and from selling any brewing facility or plant owned by General Brewing at the time of entry of this Final Judgment and Decree except after delivery of written notice of any such proposed transfer or sale to the Assistant Attorney General in charge of the Antitrust Division at least sixty (60) days in advance of the intended effective date of each such transfer or sale.

V

(A) Schlitz shall, upon and subject to the terms of this Final Judgment and Decree, divest itself of all of the business and assets of Burgermeister acquired by Schlitz on or about December 31, 1961 and all additional assets or improvements which have since been added thereto by Schlitz (hereinafter all said business, assets, additions and improvements are collectively referred to as "the Burgermeister assets").

(B) (1) Schlitz is ordered and directed to make bona fide, persistent and sustained efforts to divest itself of the Burgermeister assets by sale, to publicize the availability thereof for sale in appropriate trade and financial publications and to promote the expeditious sale thereof. Sale shall be at a price and upon terms approved by this Court which will consider, among other things, the reasonable market value of the Burgermeister assets, the importance of effectuating a prompt sale and the desirability of sale as a going business to a purchaser who will use the Burgermeister assets as a viable competitor in the sale and production of beer.

(2) Schlitz shall render monthly written reports to this Court, with copies to the Assistant Attorney General in charge of the Antitrust Division, detailing its efforts to divest itself of the Burgermeister assets and the results of such efforts. Plaintiff or Schlitz may apply to this Court for approval or disapproval of any proposal for sale by Schlitz of the Burgermeister assets. All parties shall have the right to be heard thereon.

(C) (1) Schlitz shall take such steps as are necessary to maintain the Burgermeister assets until the time of sale thereof at the standard of operating performance applicable thereto during the year preceding entry of this Final Judgment and Decree. Pending such sale, Schlitz shall not

permit the Burgermeister brewery to be diminished in capacity nor turned to uses other than the production of beer. Schlitz shall furnish, to all bona fide prospective purchasers of the Burgermeister assets, information regarding said brewery and permit them to have such access to, and to make such inspection of, the Burgermeister assets and records as are reasonably appropriate.

(2) Schlitz is ordered and directed to continue to use and operate the Burgermeister assets until the time of sale thereof in substantially the same manner in which they have been used and operated during the year preceding entry of this Final Judgment and Decree and to continue the production, advertising and sale of Burgermeister beer in substantially the same manner that such production, advertising and sale has been carried on during that year. Schlitz is ordered and directed to continue to offer to sell Burgermeister beer to the distributors who at the time of entry of this Final Judgment and Decree distribute Burgermeister beer, and to use its best efforts to retain for the purchaser of the Burgermeister assets those distributors presently selling Burgermeister beer.

(3) Schlitz shall not increase its sales, if any, of Old Milwaukee beer to distributors who sell Burgermeister beer nor its advertising or promotion of Old Milwaukee beer, if any, for sale in States where Burgermeister beer is sold until six months after Schlitz has sold the Burgermeister assets as hereinabove required.

VI

Schlitz is ordered to divest itself, completely and unconditionally, of all of those shares of capital stock it holds in Labatt to a person or persons satisfactory to the Court. Within ninety (90) days after the date of entry of this Final Judgment and Decree, Schlitz is ordered to submit to the Court (with copies to plaintiff and General Brewing)

a plan for the sale of said stock, setting forth to the extent then known all of the terms and conditions of sale and the identity of the proposed purchaser or purchasers. Pending the complete divestiture of said stock, Schlitz is enjoined and restrained from exercising any dominion or control over said stock, directly or indirectly.

VII

(A) For the purpose of securing compliance with this Final Judgment and Decree and subject to any legally recognized privilege, duly authorized representatives of the Department of Justice shall, upon written request of the Attorney General or of the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to defendants at their respective principal offices, be permitted (1) reasonable access during the office hours of defendants to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of defendants relating to any of the matters contained in this Final Judgment and Decree; (2) subject to the reasonable convenience of defendants, and without restraint or interference, to interview officers, directors, agents and employees of defendants regarding such matters. All those so interviewed may have their own counsel present during all such interviews and shall, prior to interview, be advised of this provision therefor.

(B) Upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, said defendants shall submit such reports in writing with respect to the matters contained in this Final Judgment and Decree as may from time to time be necessary for its enforcement.

(C) No information obtained by the means permitted in this Section VII shall be divulged by any representative

of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff, except in the course of proceedings in which the United States is a party for the purpose of securing compliance with this Final Judgment and Decree or as otherwise required by law.

VIII

This Court expressly retains full jurisdiction for the purpose of enabling any of the parties to this Final Judgment and Decree to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment and Decree or for the modification or termination of any of the provisions thereof or for modifications which, consistently with the purposes thereof, may better comport with sound business practices or for making different or additional provisions for the divestiture by Schlitz of the Burgermeister assets and the Labatt stock if such divestitures have not been completed with all reasonable dispatch or for modification or termination of any of the provisions thereof by this Court on its own motion, and for the enforcement of compliance therewith and punishment of violations thereof. The retention of jurisdiction herein provided for shall not be exercised to relieve Schlitz of its duty, under this Final Judgment and Decree, to divest itself of the Burgermeister assets and of its stock in Labatt. No person shall subvert any provision of this Final Judgment and Decree by indirection or otherwise.

IX

Plaintiff's costs shall be taxed against defendant Schlitz.

Dated: March 24, 1966.

STANLEY A. WEIGEL
Judge

MOTION FILED
SEP 22 1966
SUPREME COURT, U. S.

No. 486

In the Supreme Court of the United States

OCTOBER TERM, 1966

JOS. SCHLITZ BREWING COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA
and
GENERAL BREWING COMPANY,
Appellees.

On Appeal from the United States District Court
for the Northern District of California
Southern Division

Motion for Leave to File a Brief as Amici Curiae
and
Brief of Amici Curiae

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September 22, 1966

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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Appellees.

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Southern Division

Motion for Leave to File a Brief as Amici Curiae

Philip A. Ray and George Alef, as minority Directors of General Brewing Corporation elected by over 300 shareholders (owning more than 30% of General's shares worth over $3,000,000 at current market values), together with Lewis B. Reynolds, a shareholder of Capital Estates, Inc., individually and on behalf of all other minority shareholders of Capital Estates (owner of 47.5% of the stock of General Brewing), respectfully move for leave to file the attached brief as amici curiae. Consent to the filing

of a brief as amici curiae, though requested, was summarily denied by the attorneys for the United States and General Brewing. Attorneys for Jos. Schlitz Brewing Company have neither consented nor refused consent because time did not permit submission of our brief to them in advance of the filing of this motion.

We believe probable jurisdiction should be noted by the Court and that the views of amici should be heard. Fundamental questions, not presented to the District Court, relating to the rights of affected shareholders in divestiture proceedings are presented herein. No one presently before this Court is capable of, inclined to, or did in fact present the interests of such shareholders to the court below. This case is representative of the growing volume of divestiture proceedings involving complex inter-corporate structures designed to maintain control by one corporation over other publicly-held operating companies. Where, as here, more than one method of complete divestiture is available to cure the anti-competitive condition found by the District Court to exist, the selection of the method should be made only after full consideration, not only of the effect upon the corporate parties litigant, but of its impact upon their unrepresented and innocent public shareholders.

The District Court, considering only the remedies suggested by those representing the limited interests before it, concluded that divestiture by Schlitz of its shares in John Labatt Limited, a Canadian corporation, rather than the divestiture of Labatt's control of General, was the appropriate remedy here. In reaching this determination, the court invited and received, in addition to those of the parties actually before it, the views of Labatt, one of the shareholders of General Brewing and Capital Estates. It did not seek the views of any other shareholders of Gen-

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The United States has subsequently consented to the filing

eral or Capital Estates. Inasmuch as Labatt controls General, the purported position of General as presented to that court was, of course, identical to that of Labatt—that Labatt control of General was beneficial to General. Put another way, the voice heard in the trial court was not that of General Brewing Corporation but only that of a self-interested shareholder. On behalf of other shareholders of General and Capital Estates—neither represented nor heard in the court below—we strenuously dispute the Labatt position. Labatt's only interest is self-interest. This was shown by the testimony of its officers before the District Court that "it intended to use General Brewing as a vehicle" for expanding Labatt's operations in the United States and that it did not propose to use its funds in doing so. It has exercised and is exercising its control to the severe and continuing detriment of General and of the other General shareholders.

We move this Court to grant leave to file the attached amici curiae brief and urge that the Court give plenary consideration to the question of whether or not the rights of all stockholders of the corporations involved were afforded proper consideration.

Respectfully submitted,

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TABLE OF AUTHORITIES CITED

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United States v. E. I. du Pont de Nemours & Co., 177 F.Supp. 1 (N.D. Ill., 1959); rev'd 366 U. S. 316 (1961) 7

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On Appeal from the United States District Court
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Southern Division

Brief of Amici Curiae

STATEMENT OF INTEREST

1. Identity of Amici.

This brief is filed by Philip A. Ray and George Alef, minority directors of General Brewing Corporation (sued herein as General Brewing Company), together with Lewis B. Reynolds, a shareholder of Capital Estates, Inc. (owner of 47.5% of the shares of General Brewing), individually and on behalf of all other minority shareholders of Capital Estates, Inc.

2. The Multi-corporate Control Structure.

The capital stock of General Brewing Corporation is held in the following manner:

16.1% by John Labatt Limited, a Canadian corporation
47.5% by Capital Estates, Inc., a Delaware corporation
36.4% by approximately 600 unorganized shareholders.

In addition to its outright 16.1% ownership in General, Labatt owns 59.7% of the stock of Capital Estates. It thus has majority control of that corporation and by virtue of the latter's 47.5% interest in General, Labatt controls General although it does not own a majority in beneficial interest of General's shares. The majority beneficial interest is owned by over 1,200 public shareholders of General and Capital Estates.

3. The Complaint and Temporary Restraining Order.

When Schlitz acquired effective control of Labatt by purchasing 39% of its stock, the government commenced action against Schlitz and General asserting violation of Section 7 of the Clayton Act by virtue of Schlitz's effective control over General through Labatt. The District Court immediately enjoined Schlitz's exercise of its stock rights in Labatt, thus giving control of Labatt, Capital Estates and General Brewing to an unidentified minority of Labatt.

4. The Trial Court's Actions in the Light of the Record.

After trial, the District Court concluded that control by Schlitz of General violated Section 7 of the Clayton Act and, in fashioning a decree, considered the views expressed by the parties, i.e. the government, Schlitz and General (really Labatt), and then invited Labatt's view as if Gen-

eral were independent of Labatt, and as if Labatt were representative of all shareholders of General and could represent their best interests. The views of the other owners of stock in General and Capital Estates were not represented to the court nor was the effect of the decree on them considered. Predictably, Labatt directly and through General, took the position that Labatt's control of General was good for General. The court so found, notwithstanding that since the acquisition by Labatt of control of General, the business affairs of General have deteriorated year by year without exception. Annual earnings of General have declined as follows:

1958	$3,945,000
1959	$3,738,000
1960	$2,673,000
1961	$1,605,000
1962	$1,354,000
1963	$1,150,000
1964	($ 827,000)
[Net Loss After Tax Credit of $1,112,000]	
1965	($2,319,850)
[Net Loss After Tax Credit of $1,629,000]	

Moreover, from November 1, 1961, through May 31, 1965, Labatt charged General Brewing over $300,000 for consultation and research supposedly furnished General by Labatt, notwithstanding General's sales and earnings severely declined through that period. In addition, Labatt caused General Brewing to produce and market Labatt's beer in General's market area at a true cost burden to General of more than $1,000,000 to date. None of this cost will be recovered since General's sales of Labatt's beer are now trifling and have been virtually discontinued.

Labatt's control of General has been injurious to General and its shareholders and the shareholders of Capital Estates, and has decreased General's competitive position in California, its primary market area, and a market area in which, during the same period, total beer sales increased by more than 31%.

5. Labatt's Suppression of any Voice for General's Shareholders.

The judgment of the District Court herein was entered on March 24, 1966. On April 5, 1966, at the annual meeting of the stockholders of General Brewing Corporation, Philip A. Ray and George Alef were, after a proxy contest with Labatt, elected directors of General for the first time by over 300 independent, non-Labatt shareholders who own over 80% of the non-Labatt controlled shares. The other six of General's eight directors were nominated by Labatt and elected by its use of its control of General. Of these six directors, four are presently officers and/or directors of Labatt. Among those 300 non-Labatt shareholders are Mr. Paul Kalmanovitz, a principal shareholder and officer of Maier Brewing Company of Los Angeles, which is engaged in the manufacture, sale and distribution of beer in California. Mr. Alef is administrative assistant to Mr. Kalmanovitz, president of Maier Brewing. Mr. Ray is an attorney at law, admitted to practice for over thirty years in the State of California, a member of the Bar of this Court and a former Under Secretary of Commerce of the United States. Mr. Ray is not employed by, nor is he a shareholder, officer or director of Maier Brewing Company.

Following April 5, 1966, no meetings of the board of directors of General Brewing Corporation were called until July 30, 1966, though they were requested by Directors

Ray and Alef. On August 30, 1966, Messrs. Ray and Alef first learned that General Brewing Corporation intended to take in its motions and briefs to this Court, the position that control of General by Labatt was advantageous and beneficial to General. Thereafter, on about September 2, 1966, pursuant to requests by Mr. Ray, all of the directors of General were furnished copies by General's counsel of the Jurisdictional Statement filed herein by Jos. Schlitz Brewing Company.

On September 7, 1966, Messrs. Ray and Alef, in accordance with the by-laws of General, called a special meeting of its board of directors, held September 14, 1966, and moved adoption of resolutions to the effect that General refrain from taking the position that control by Labatt was beneficial to General. This motion was defeated by a six-to-two vote, Messrs. Ray and Alef voting in favor of said motion and the Labatt-controlled directors voting against it. Thereupon, in retaliation, the Labatt directors caused adoption of several resolutions severely restricting the voice of non-Labatt shareholders and directors in the management of the corporation. At the same meeting, after prior written request, General's management even refused to tell its minority directors the amount of General's expenses incurred in connection with this litigation—expenses incurred in large part for the purpose of maintaining Labatt's control of General—on the ground that they were not known.

Amici curiae have no interest in Schlitz, nor any interest in the ultimate outcome herein as it may affect Schlitz. Messrs. Ray and Alef, as directors, do have an obligation and duty as fiduciaries for all of the shareholders of General Brewing Corporation. In the opinion of all amici, Labatt's control of General is disadvantageous in the ex-

treme to General and Capital Estates and beneficial only to Labatt.

ARGUMENT

1. The Question of Divestiture in the Light of the Record.

The District Court found that Schlitz's indirect control of General through Labatt was violative of Section 7 of the Clayton Act. The appropriate remedy had to be selected in the light of a record that showed:

A. During the years General had been controlled by Labatt, it steadily declined as a factor in the market.

B. Labatt while wanting General as a vehicle for expanding *Labatt's* operation in the United States was unwilling to utilize Labatt funds to further this purpose.

C. Labatt's control of General was structured through other controlled corporations in such a manner that while controlling 63% of the stock, its beneficial ownership was less than 50%.

2. The Proposals Presented.

The parties litigant urged alternative proposals either of which would have seemingly cured the violation. Schlitz sought to retain its interest in Labatt and cause Labatt to dispose of its interest in General Brewing in any manner satisfactory to the government. The government, supported by General Brewing, insisted upon Schlitz's divestiture of its interest in Labatt. The District Court invited Labatt, but no other shareholder of General or Capital Estates, to be heard.

3. The Right of Affected Parties to Be Heard.

This Court has long recognized that in fashioning antitrust remedies, district courts must consider the impact of their decrees upon privately-held interests. *United*

States v. American Tobacco Co., 221 U. S. 106, 185 (1911); *United States v. E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 327-28 (1961).

Further, where there exist two or more alternate methods of complete divestiture, the hardship or consequences of each on shareholders and others affected should be considered, and if both alternate remedies are equally effective, such hardship and consequences should be determinative. In a case such as this, where Labatt is unable, because of a conflict of interest with its co-shareholders of General and Capital Estates, to properly represent their interests, the court below should have appointed amici to express the views of those shareholders. (Compare *United States v. E. I. du Pont de Nemours & Co.*, 177 F.Supp. 1, 6 (N.D. Ill., 1959); rev'd 366 U. S. 316 (1961), where the District Court appointed two amici curiae to represent the du Pont stockholders and the General Motors stockholders. Their views were considered both by the District Court and this court.)

4. Labatt's Disability to Speak for Any Shareholders.

A. CONFLICT OF INTEREST

Patently Labatt had, and has, a conflict of interest with those other shareholders and could not, nor can it now, nor can its controlled General Brewing management, be said to have fairly spoken for such shareholders. As indicated previously, those other shareholders include people active in and knowledgeable about the beer industry. Their views on the competitive effect of and desirability of Labatt's control of General should have been considered, certainly where as here the uncontroverted facts in the record show that General, under the control of Labatt, instead of continuing to be a viable competitor, has become

an ever-decreasing factor in the market, with concomitant red ink on its financial statements and a decline in its over-all value.

B. LABATT'S PURPOSE

Labatt's aim and purpose is clear, as even the testimony of its officers in the court below shows. They testified that Labatt intended "to use General as a vehicle" for expanding *Labatt's* operations into the United States. (253 F.Supp. at 147.) They also admitted that Labatt was not prepared to give General fiscal aid or assistance.

Use of a corporation by the controlling stockholder as "a vehicle" for that stockholder's particular advantage, none of which will accrue to the benefit of the other stockholders, is a patent injustice to the latter group which cannot be countenanced, even in the name of competition.

C. THE VOICE HEARD

Significantly the Labatt voice heard by the court below, directly or through General Brewing, speaks at the most for a minority, non-controlling group of Labatt stockholders, since the control block of Labatt stock is held by Schlitz. Accordingly, if that court's decree is allowed to stand and Schlitz divests itself of control of Labatt, Labatt's assurances of Labatt's future plans for General Brewing, upon which the District Court's decision was largely based, are subject to change by the person purchasing control of Labatt.

While in the ordinary case it might be sufficient to say that the corporate management speaks for all of the stockholders, that is clearly a superficial and wholly insufficient answer here. The present General management was selected

by and is controlled by Labatt, another large brewer. That management is violently hostile to any who dare oppose the Labatt-dictated direction of General as is demonstrated by the recent resolutions precipitately adopted by its board of directors, including one which increased from two to three the number of directors required to call meetings of directors. As there are only two non-Labatt members on the board, those members are now unable even to make their voices heard unless the Labatt majority deigns to call a board meeting.

5. The District Court's Implicit Sanction of Labatt's Overreaching.

The obvious implication of the foregoing is that one block of shareholders of General feel that Labatt's control is not only bad for General, but that Labatt is affirmatively using General, not for the best interests of General and all its stockholders, but for the best interests of Labatt. While this statement of the situation would ordinarily suggest the institution of a shareholders' derivative action, the District Court, with the salient facts before it as to the actions of Labatt vis-a-vis General, has determined that Labatt's activities are good for General (or at least for competition, if not for General). Without giving the other stockholders an opportunity to be heard, it is giving the imprimatur of the United States District Court to Labatt's acts and is sacrificing those other stockholders' interests on the altar of possible prospective competition. We do not quarrel with the power of courts to harshly affect the interests of third parties in the name of competition, nor even the desirability of so doing under circumstances that require it to be done, to remedy violations of the antitrust laws. We do submit, however, that the parties affected should be heard.

6. An Additional Consideration Requiring That Stockholders Be Heard.

The appropriateness of hearing from the other shareholders of General and/or of Capital Estates is enhanced when one considers that the enjoining of Schlitz's voting of Labatt shares gave control of Labatt, Capital Estates and General to a minority of Labatt, whereas, if the court had sterilized not only the Schlitz voting of the Labatt stock, but sterilized as well the power represented by that stock in the inter-corporate structure, control of General would have passed to the very people now asking to be heard, people who would have presented the court with far different views as to the competitive effect or the desirability of Labatt's control of General. We are not saying that the granting of the temporary restraining order was error—rather that having selected that form of order the court should have heard from all affected persons—or that they now, at least, be heard from. The fiction of separate corporate entities was ignored in determining whether a violation of the antitrust laws occurred, but then in determining the remedy to be applied to govern the future the court acted as if the corporations were independent of their shareholders.

CONCLUSION

The decree of the District Court was formulated and rendered without regard for the rights of and duties owed to minority shareholders. It is submitted that the Court should note probable jurisdiction in order to give plenary consideration to the question of whether the rights of all of the shareholders concerned have been adequately considered and protected, appointing, if it appears necessary

or desirable, additional amici curiae to represent the interests of such shareholders.

Respectfully submitted,

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No. 486

In the Supreme Court of the United States

OCTOBER TERM, 1966

JOS. SCHLITZ BREWING COMPANY, *Appellant*

vs.

UNITED STATES OF AMERICA

and

GENERAL BREWING COMPANY

On Appeal from the United States District Court
For the Northern District of California
Southern Division

Motion of General Brewing Corporation to Affirm

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In the Supreme Court of the United States

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Southern Division

Motion of General Brewing Corporation to Affirm

Pursuant to Rule 16, Paragraph 1(c) of the Rules of this Court, General Brewing Corporation ("General Brewing") moves that the judgment of the district court be affirmed on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal from the final judgment of the district court, which held that appellant Jos. Schlitz Brewing Company ("Schlitz") violated Section 7 of the Clayton Act, as amended, 64 Stat. 1125 (1950), 15 U.S.C. Section 18 (1964), by acquisitions affecting two California-based breweries. In 1961 Schlitz purchased the assets (except cash) of Burgermeister Brewing Corporation ("Burgermeister"), and in 1964 Schlitz acquired indirect control of General Brewing by purchasing 39.3 per cent of the stock of John Labatt Limited ("Labatt"), carrying with it effective control of both Labatt and General Brewing. The Labatt purchase represents the fifth acquisition of a brewing company by Schlitz since 1946, and the 65th acquisition or merger of a brewery by a competitor since the same date.[1]

The issues raised in the Jurisdictional Statement[2] of Schlitz, to be discussed below, are so devoid of substantive merit, either legally or factually, that this Court should decline at the outset to consider Schlitz's bid to delay a final decision in this case. A review of the record will

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1. In recent years, there has been a rash of mergers in the beer industry. See, *e.g.*, *United States v. Falstaff Brewing Corp.*, Civil No. 3523 (D.R.I.), filed July 13, 1965, 5 CCH Trade Reg. Rep., para. 45,065, Case 1859; *United States v. Rheingold Corp., et al.*, Civil Action No. 65, Civ. 3372 (S.D.N.Y.), filed November 9, 1965, 5 CCH Trade Reg. Rep., para. 45,065, case 1878; *United States v. Pittsburgh Brewing Corp., et al.*, Civil No. 65-1406 (W.D. Pa.), filed December 28, 1965, 5 CCH Trade Reg. Rep., para. 45,065, case 1881; *United States v. Anheuser-Busch, Inc., et al.*, Civ. 62C45(3) (E.D. Mo.), filed January 31, 1962, 5 CCH Trade Reg. Rep., para. 45,062, case 1647.

2. Throughout this Motion, the Jurisdictional Statement is cited as "J.S." References to the Findings of Fact in the Opinion of the district court, set forth in the Appendix to the Jurisdictional Statement, are cited as "F. of F." Other references to the Opinion are cited as "Op., 253 F. Supp. at . . . ." References to the trial transcript are cited as "Tr."

confirm that the district court's conclusion that Schlitz violated Section 7 of the Clayton Act, as amended, was the only conclusion at which it could arrive. The violations of Section 7 were clear-cut and blatant. In a recent beer-merger case where the evidence of an anti-competitive effect was far less compelling,[3] this Court held that a prima facie case had been presented by the government.

The "issues" which Schlitz raises in its Jurisdictional Statement were all considered by the district court and rejected in the exercise of its discretion. The "issues" are not novel and, indeed, consist solely of questions of fact slightly rephrased. These questions were passed on by the district court, and there was ample evidence to support its findings. Schlitz's Jurisdictional Statement is a desperate attempt to secure a second trial before this Court. Since the "issues" do not even pose new questions of law, they are manifestly unsubstantial and impose upon this Court's time. The Jurisdictional Statement represents, at most, a play by Schlitz for time while it moves to consolidate its position in the West Coast beer market to the detriment of competition. It is all-important to the health of the beer industry that this Court decline now to take jurisdiction rather than unwittingly assist Schlitz's anti-competitive plans.

Anti-Competitive Effects of the Acquisitions

In this case anti-competitive effects were proven by the following evidence:

An inexorable trend towards concentration presently exist[redacted] the brewing industry.[4] Since 1952 the number of

3. *United States v. Pabst Brewing Co.*, 384 U. S. 546 (1966).

4. F. of F. No. 47.

plants has decreased from 334 to 190 in 1964, and the number of companies has decreased from 307 to 144 in 1964. For the same periods, tax-paid withdrawals, one method of measuring beer production, increased from 84,293,646 barrels to 96,247,413 barrels in 1964.[5] An important part of this concentration has consisted of mergers and acquisitions, a substantial number of which involved the largest brewers.[6] In fact, a majority of the disappearing firms were large, regional breweries which stand the best chance for independent survival.[7] The share of beer sales accounted for by the 10 largest and the 25 largest breweries soared from approximately 40 per cent and 60 per cent, in 1953, to approximately 57 per cent and 82 per cent, in 1963, respectively.[8]

With its seven breweries, Schlitz rang up sales in 1964 of $311,394,654.[9] If Schlitz should be permitted to retain control over General Brewing and Burgermeister, it will become the first-ranked brewer in the United States, with over 10 per cent of the national market.[10] Anheuser-Busch, presently industry leader, and Schlitz will have garnered between themselves over 20 per cent of the national beer market, at a time of rising beer demand.[11]

The beer industry is a classic illustration of an industry where entry by new competitors is almost impossible. Con-

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5. F. of F. No. 43.

6. F. of F. No. 48.

7. *Ibid.*

8. F. of F. No. 44. Schlitz omits from its Jurisdictional Statement Appendices A-F, part of the district court's opinion, which reveal in greater detail the data supporting many of the court's findings.

9. F. of F. No. 38.

10. F. of F. No. 50.

11. *Ibid.*

struction of a new million-barrel plant runs between $30,000,000 and $35,000,000.[12] Indeed, except for a few recent Canadian challengers, it is nonexistent.[13] Only one brewery, Carlings of Canada, has successfully entered the United States market since 1947—a period of almost two decades.[14] Until Schlitz's interference, Labatt intended to become the second such entrant.

When Schlitz acquired Burgermeister, it increased its share of California sales so much that by 1962 it had jumped from tenth place, with 3.6 per cent of sales, to third ranking with 12.3 per cent of sales.[15] With control of General Brewing and Burgermeister, Schlitz's slice of the California market, which rose from 2.4 per cent to 12.1 per cent between 1954 and 1964,[16] would be a commanding 26.8 per cent of sales, making it the largest seller of beer in California and nearly twice as large as the second-ranked firm.[17]

In the Eight-Western State area,[18] the foreclosure of competition would be equally formidable. By the acquisi-

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12. F. of F. No. 49.

13. F. of F. No. 49.

14. *Ibid.*

15. F. of F. No. 105.

16. F. of F. No. 38.

17. F. of F. No. 56. This is based on 1964 figures. Schlitz's California sales have jumped to first place among California-based producers, according to recent industry records. See discussion, *infra*. Even if a Schlitz-coerced disposition of Labatt's interest in General Brewing should be sanctioned by this Court, the net effect would be the same, since General Brewing would be deprived of the considerable support which Labatt has given and promises to continue to give.

18. The Eight-Western States area consists of the contiguous States of California, Oregon, Washington, Idaho, Montana, Nevada, Utah and Arizona. Its boundaries are the Pacific Ocean, the Canadian and Mexican borders, and, approximately, the Continental Divide. F. of F. No. 18.

tions, Schlitz would dominate the area as the largest seller of beer with 23 per cent of sales.[19] In Hawaii, Schlitz would merely confirm its already monopolistic position by seizing 50.9 per cent of beer sales there.[20]

The latest available industry figures confirm the wisdom of the district court's decision. Even without considering General Brewing, Schlitz has, for the first seven months of this year, gone from fourth to third rank in California beer sales, pulling ahead of Anheuser-Busch.[21] Of the California-based producers, Schlitz is now first in sales, with 755,966 barrels out of sales of 5,846,063 barrels.[22] This marks the largest annual increase—111,148 barrels—of *any* brewer selling in California. Of the total 353,760-barrel increase in sales of beer from the same period a year ago, Schlitz has captured over 31 per cent.[23] Schlitz has posted to date a 19.3 per cent increase in California sales over a year ago, as compared with sales of other California-produced beers.[24] For the month of July 1966 alone, the hike was again the highest, almost a 25 per cent increase.[25] Thus, in gluttonous fashion, Schlitz is already exploiting the advantages which accrued to it from the

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19. F. of F. No. 55.

20. F. of F. No. 58.

21. The California Brewers Association reports, in its Statistical Report, dated August 24-25, 1966 and attached hereto as Appendix A, that Schlitz captured 12.9 per cent of all California sales in the calendar year through July 31, 1966. See Statistical Report No. 2, p. 2. This compares with 11.7 per cent of California sales the same time a year ago. For the month of July 1966, Schlitz evidenced the greatest jump in sales over its main competitors, as compared with sales for July 1965. Statistical Report No. 2, p. 1.

22. Statistical Report No. 1, p. 1.

23. Statistical Report No. 2, p. 2.

24. Statistical Report No. 1, p. 2.

25. Statistical Report No. 1, p. 2.

Burgermeister take-over. The present anti-competitive effects of the Burgermeister acquisition are so pronounced, that it requires little imagination to forecast the future adverse results likely to arise from the Labatt-General Brewing acquisition.

The Role of General Brewing

General Brewing consistently supported the government's position throughout the trial. Its sole desire is to participate, unencumbered by Schlitz, in the booming Eight-Western States, California and Hawaii beer markets, as well as the Nation.[26] It desires to compete on its own terms, freed from any control which Schlitz may exert through its control of Labatt.[27] It has long considered itself a competitor of Schlitz, and has felt confident of its ability so to compete. Having weathered fierce competition in these market areas as well as the consequences of a prolonged industry strike, General Brewing has now begun a return to its former dominant market position.[28] Further, Labatt announced repeatedly throughout the trial its pledge of continued assistance to General Brewing.

General Brewing has conducted itself throughout this litigation as it feels a competitor should. It continued to operate as a business, and to make business decisions. In

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26. Schlitz apparently concedes that the district court correctly found that all of these markets were appropriate sections of the country in which to measure the competitive effects of the acquisitions. In its Notice of Appeal to this Court, Schlitz had raised this as Question No. 5.

27. It would be a strange perversion of Congress' intent if this Court were to sanction an indirect acquisition of the stock of a corporation which professes a desire to remain a viable competitor in the market place. The issue is as simple as that.

28. General Brewing's latest income statement shows a profit of $906,146 as of June 30, 1966, compared with a loss of $507,656 as of June 30, 1965.

furtherance of this policy, following trial, but before a decision on the merits, a decision was made to sell off its Azusa, Calif., plant to Miller Brewing Company ("Miller"), and thereby cut its losses, with no adverse effect upon its ability to supply its present market demands.[29] An immediate savings of $8,000,000 resulted from this move, together with a capital gain of approximately $1,700,000. The sale of the plant meant elimination of a substantial annual overhead in the amount of $2,181,000. Schlitz was not brought in on the negotiations for this sale. There was certainly no duty on General Brewing's part to do so.[30]

General Brewing's primary goal was explained to the district court when it opposed Schlitz's motion to reopen the case. It stated its desire that General Brewing be allowed to remain in business as a viable competitor and that this case be finally decided as expeditiously as possible. If the judgment is affirmed by this Court, the presently unsettled status of General Brewing will be resolved.[31]

The Negotiations for the Labatt Stock

Although Schlitz later proclaimed innocence of any designs upon General Brewing, the testimony was scarcely

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29. Sale of the Azusa plant still leaves General Brewing with modern plants in San Francisco, Calif., Vancouver, Wash., and Salt Lake City, Utah. The sale trimmed expensive unused production capacity, with more than ample capacity to meet present and projected market demands.

30. Schlitz's real complaint is that General Brewing still acts as a competitor, while Schlitz must stand by in frustration, unable to impose its will upon Labatt vis-a-vis General Brewing.

31. By a stipulation entered into between the government and Schlitz, portions of the final judgment and decree relating to divestiture have been stayed until final disposition of the appeal of Schlitz to this Court. General Brewing did not acquiesce in this stipulation.

credible. The district court characterized Schlitz's contention as not convincing. Schlitz now repeats that it was unable to persuade the Labatt stockholders, before whom it dangled $39,000,000, to require disposition of Labatt's interest in General Brewing. This should have been easy, it would seem, if General Brewing was, as Schlitz maintains, a "failing, profitless company." Schlitz said it had only desired to invest in the Canadian beer market. Yet it proceeded in strange fashion. It offered the Labatt shareholders more than the current market price in order to obtain working control. Schlitz was prepared to pay, and in fact did pay, a premium for the shares of Labatt. Schlitz, at first, considered buying the Labatt stock at $22.50 a share, which was referred to as "a premium of about $4.00 over market."[32] In fact, Schlitz finally paid $23.00 per share. In the view of Equitable Securities Canada Limited, this price represented "an historically high level for the stock" which discounted "future growth of the Company for some years."[33] It carefully judged how much stock it would have to purchase in order to obtain control of Labatt and indirect control of General Brewing.[34] During the negotiations Schlitz's representatives pointedly asked Labatt management to refrain from introducing the Labatt brand into California,[35] which, as a premium beer, would have competed with the Schlitz brand. The proposed introduction of the Labatt brand, indeed, threatened for awhile to "kill" the Schlitz purchase of Labatt stock.[36] Schlitz simply could have insisted that Labatt's interest

32. Tr., p. 23.
33. F. of F. No. 78.
34. F. of F. Nos. 39 & 77.
35. F. of F. No. 82.
36. Tr., pp. 711-12.

in General Brewing be divested prior to its purchase. It did not do so. The president of Schlitz lamely tried to suggest a distinction between the Labatt stockholders with whom Schlitz was dealing and the Labatt board of directors, which the former controlled.[37] The district court aptly observed:

> "[I]t should be pointed out that the trial court is not convinced that from the outset of its negotiations with Labatt, Schlitz had no desire to control General Brewing. If this were true, Schlitz could have gone a great deal further in making sale of General Brewing a prerequisite for its purchase of Labatt stock."[38]

The district court thus declined Schlitz's invitation to "home-make" its own antitrust remedies.[39] Schlitz has never suggested that, at a later date, it be permitted to purchase stock in Labatt which does not give it control over General Brewing, or acquire stock in another Canadian

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37. Tr., p. 1314. This failure to require Labatt to sell its General Brewing holdings is revealing in light of Schlitz's determination to apply pressure to consummate its purpose:

> "With the hurried up approach in mind, I think we have to risk being a bit brisk with the Labatt people and simply tell them what we are about to do as soon as we are ready to do it." Defendant Schlitz's Exhibit DSX-8, p. 1.

38. Op., 253 F. Supp. at 148.

39. The district court did order each of the parties to submit a suggested form of decree. Schlitz's proposed "decree," however, avoided any attempt to propose a conditional decree such as it now requests of this Court. The full text of the Schlitz proposed decree was as follows:

> "The Government having failed to prove that the effects of the acquisition of Burgermeister Corporation by Jos. Schlitz Brewing Company in December 1961 and the purchase of 39.3 per cent of the outstanding common stock of John Labatt Limited by Jos. Schlitz Brewing Company in February 1964 may be substantially to lessen competition or tend to create a monopoly in any section of the country in any line of commerce, the complaint is hereby dismissed." Post-Trial Brief, Proposed Findings of Fact & Conclusions of Law & Proposed Decree of Jos. Schlitz Brewing Company, J.S., Appendix B.

brewer. Nor has it ever explained satisfactorily why it did not consider construction of a new brewery in Canada.

The Acquisitions

In February, 1964, Schlitz, the Nation's second largest brewer, purchased for $39,000,000 a controlling stock interest in Labatt, which in turn controls 63.5 per cent of the common stock of General Brewing.[40] Schlitz did not trouble to seek out the views of the Justice Department, or request a formal clearance, as it had done in the past.[41] Schlitz thus was able, by a single purchase, to consolidate its foothold in the growing California, Western and Hawaiian beer markets, and to eliminate a potential Canadian competitor from the United States market.

Three years previously, Schlitz had shown its interest in these expanding markets by acquiring the assets of Burgermeister. Indeed, attracted by the population growth and concomitant beer demand, several national brewers ventured into these markets.[42] Schlitz's efforts to capture a share of these markets through the Burgermeister acquisition proved initially disappointing.[43] Sales of the Schlitz-Burgermeister brands fell slightly following the Burgermeister acquisition. The combined Schlitz-Burgermeister sales in California in 1964 were 1,036,762 barrels, compared with 1,179,665 barrels in 1959. By the indirect acquisition

40. F. of F. No. 41.

41. F. of F. No. 85.

42. For example, Anheuser-Busch and Pabst have opened breweries in California in recent years. Tr., pp. 111 & 613. See also F. of F. No. 99.

43. Schlitz's own sales in California, prior to the Burgermeister acquisition, also proved disappointing. In 1955, out of total sales of 5,780,000 barrels, Schlitz had 4.01 percent of total sales in California. By 1961, this share had dropped to 3.6 per cent.

of General Brewing, Schlitz could add to its stable of breweries in these markets, eliminate two substantial competitors (Labatt and General Brewing) and over double its sales in California as of 1963.[44] Or it could, as it now proposes, deprive General Brewing of the assistance of Labatt, and thereby debilitate a strong competitor.

The government filed its suit against Schlitz as to both of the acquisitions on February 19, 1964, alleging that the acquisitions violated Section 7 of the Clayton Act, as amended, because the effect of each acquisition might be substantially to lessen competition or to tend to create a monopoly in the production and sale of beer in the United States, the Eight-Western States market, and the States of California and Hawaii. At the trial, the court heard extensive testimony over a four-week period.[45] As an aid in deciding a voluminous case of this nature, it ordered counsel for the parties to prepare summaries of each day's testimony as it related to each of 15 issues in the case. The court also directed each of the parties to submit a post-trial brief and reply brief, together with proposed findings of fact, conclusions of law and a decree.[46] After the trial, and approximately six months later, Schlitz orally requested a hearing on a motion to reopen the case for further evidence concerning the then-proposed sale of the Azusa plant of General Brewing to Miller. At that hearing the district court ordered Schlitz to prepare a writ-

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44. Plaintiff's Exhibit 32.

45. Despite its protests of a lack of preparation, Schlitz was able to introduce into evidence about 170 exhibits. Schlitz proposed a list of over 75 witnesses, and it called many of them. While extremely well-prepared for trial, Schlitz can only blame any purported lack of preparation on its sudden decision, a month or so prior to trial, to change its trial counsel.

46. Schlitz presented a 53-page post-trial brief, together with 158 proposed findings of fact and conclusions of law.

ten motion, and to demonstrate in what respect, if any, the sale would affect any of the issues in the case. At the subsequent hearing, Schlitz was unable to justify its request for an open-end reopening of the record. The most that Schlitz could show was that any evidence relating to the sale would be cumulative as to evidence already in the case. The court properly characterized the sale as a business decision on the part of General Brewing's directors, which did not change the complexion of the case, and denied the motion. Judgment was entered the following month, in which the court ordered divestiture by Schlitz of both acquisitions.

Purchase of the Labatt Shares

Schlitz labored considerably at the trial to demonstrate that the "only feasible way" to enter the Canadian market was through purchase of the Labatt stock. The district court refused to adopt any of Schlitz's proposed findings of fact in this regard. The composite which emerged at the trial was one common to both the United States and Canada. The beer industry is highly regulated everywhere. Local requirements for licenses and other restrictions are applied uniformly in Canada without discrimination. There is no discrimination against the import of U. S. beers into Canada, either through taxes or otherwise.[47] There is no need, "legally or practically," of association with a Canadian brewery for an American brewer to market its products successfully in Canada. The cost of building a plant of 100,000-barrel capacity in Canada would be approximately $3,500,000, and would require approximately $10,-

47. The fact of the matter is that American-made beers have not appealed to the Canadian taste. Pabst Brewing Company was unsuccessful for this reason. Tr., pp. 1995, 1999-2028.

000,000 for the first few years of operation before breaking even. This would be far less than the total price paid by Schlitz for the Labatt stock. Expenditure of $39,000,000, the cost to Schlitz for the Labatt stock, would certainly have sufficed for Schlitz's entry into the Canadian market through construction of a new brewing facility. It would have faced no obstacle in obtaining a license to construct such a plant. Nor are there insurmountable difficulties in distribution of American products throughout Canada. The testimony of Mr. John B. Cronyn, executive vice president and member of the board of directors of Labatt, was unequivocal that an American brewer can enter the Canadian beer market, if it so desires, by constructing a modern plant.[48]

Schlitz was correctly advised by the Labatt management that its acquisition of the Labatt stock would meet with an adverse reaction from the Canadian public,[49] yet it persisted in proceeding with the purchase.

The Temporary Restraining Order

Schlitz repeatedly asked the district court to suspend the restraining order so that it could arrange for disposition of the General Brewing stock by Labatt. Schlitz misstates, however, the reason for the unanimous opposition to such a suspension. If Schlitz had been able to exercise control over Labatt, it could have arranged a sale of General Brewing in a manner detrimental to General Brewing, quite aside from any other anti-competitive moves inherent in such control. In so doing, Schlitz could have accomplished the very purposes for which it undertook the Labatt purchase originally. It could have terminated Labatt

48. See Tr., pp. 1992 et seq.

49. F. of F. No. 79.

as a potential entrant into the United States beer market, and it could have seriously weakened General Brewing's efforts to compete against Schlitz and Burgermeister. In effect, Schlitz could have emasculated any decree the district court would eventually enter. Not unexpectedly, the district court denied Schlitz's motions.

The very purpose of the restraining order was to remove Labatt from the adverse influence of Schlitz. Schlitz was well aware of the antitrust implications of its purchase,[50] and assumed a calculated businessman's risk. During the period following the temporary restraining order, changes in the normal course of business were made in the Labatt organization. The changes which Schlitz enumerates in its Jurisdictional Statement — the reorganization of Labatt into a holding company, the transfer of brewing operations to a subsidiary, the sale of real estate, acquisitions of non-brewing properties and joint ventures with European brewers — were, however, never issues in this case. The activity which Labatt undertook with respect to General Brewing *was,* on the other hand, an issue in the case, and it developed that Labatt promised to continue to render technological and other valuable assistance to General Brewing,[51] including granting of a franchise license of the Labatt brand in the Western portion of the United States.[52]

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50. F. of F. No. 80.

51. The district court found as follows:
"In connection with the plans to expand General Brewing, and also in its role as the parent corporation, Labatt has given extensive practical and technical assistance to General Brewing of great value to the latter." F. of F. No. 63.

52. F. of F. No. 64. In any event, although never an issue in in the case, Schlitz's misrepresentation that General Brewing was made the beneficiary of an "illicit division of world beer market" should not go unanswered. The fact is that General Brewing has no connection whatsoever with any international agreements to divide world beer markets.

The Issues Respecting the Labatt Shares

Schlitz, thus, has repeatedly sought leave to arrange for a private, unsupervised dumping of General Brewing on the open market. The government and General Brewing have opposed this move since it would not only weaken a strong competitor of Schlitz in California, Hawaii and the Eight-Western State areas, but would remove Labatt as a *potential* competitor in the United States. Labatt management testified that Labatt intends to enter this country by utilizing its General Brewing holdings as a vehicle. The plan is to move the General Brewing and Labatt brands into the Eastern market. The program envisaged by them entails close cooperation between Labatt and General Brewing.[53] The court itself expressly found that Labatt's plans represent substantial potential competition in the United States, the Eight-Western States and California "which will be eliminated if Schlitz is allowed to control Labatt."[54] Schlitz's "generous" offer to require Labatt to dispose of its interest in General Brewing was thus received by everyone concerned with justified skepticism. Could any course of conduct be better calculated to injure General Brewing as a competitor of Schlitz? General Brewing, Labatt, the government and the district court have all turned down this inducement, since the whole purpose of this action is to permit Labatt and General Brewing to carry on, unimpeded, in their plans for participating in the growing United States beer market.[55]

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53. It entirely misses the point, then, to urge that Schlitz and Labatt are not potential substantial competitors or that no witness "believed that Schlitz control of Labatt standing alone posed any such threat [to competition in the brewing industry]." J.S., p. 9.

54. F. of F. No. 66. See also F. of F. No. 67.

55. This is the manner in which the Carlings and Molson breweries of Canada have entered the U. S. market.

Schlitz raised at trial a point which was wholly extraneous to this action. Schlitz contended that General Brewing's performance in its market areas—which underwent a temporary decline—was attributable to Labatt influence, and hinted darkly at an invidious agreement between the two to lose money deliberately. Schlitz stumbled rather awkwardly on the problem of causation, particularly since the General Brewing board of directors has acted independently at all times of the Labatt board of directors. Schlitz also overlooked fierce competition which General Brewing has encountered in its markets. California, the Eight-Western States and Hawaii have unarguably become, in the past ten years or so, arenas of intense infighting among beer manufacturers.[56] General Brewing also was an unwilling victim of a crippling industry strike in California in 1964. General Brewing's earnings record prior to filing of the present action was notable.[57] The uncertainty created by this litigation has necessarily affected the morale of its executives. Another reason for its temporary losses is that General Brewing was forced to reduce prices to meet the competition of Schlitz.[58]

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56. California, for example, has shown an increased beer consumption since 1947 by a substantial amount, whereas there has been a shortage in other large beer-consuming-states such as New York and Pennsylvania. Tr., pp. 960-961. California is regarded as an "extremely important segment" of the market. Tr., p. 960. Sales by the barrel in California rocketed from 1,826,929 barrels in 1934 to 9,152,908 barrels in 1964. Opinion, Appendix C. Beer companies, particularly the nationals, eye California today as a focal point of most effective and "strong" competition between beer manufacturers. Indeed, the rapid increase in California's population "has effectively directed all competition to work on California as a market in itself." Tr., p. 487.

57. General Brewing showed a profit of $1,150,532 in 1963, the year immediately prior to the filing, and even greater profits for many years preceding such filing. In 1964 it incurred its first loss in approximately 25 years. Defendant Schlitz's Exhibit 199, p. 4.

58. Tr., pp. 1447-48.

Since then General Brewing's performance has markedly improved. By selling its Azusa plant, without decreasing its ability to meet sales, General Brewing realized an immediate receipt of cash as well as a large capital gain, and trimmed overhead and retired a loan, thereby eliminating a substantial amount of annual interest. The most recent income statement of General Brewing shows an increase in sales and income over a year ago. Labatt has stated its intent to expand General Brewing.

The district court correctly observed that evidence of General Brewing's temporary financial embarrassment in competitive markets was outside the issues of this case. The real issue is whether Labatt offers promise as a potential competitor of Schlitz in the United States. Evidence on this point was supplied by testimony of the Labatt management, such as Mr. John B. Cronyn. Mr. Cronyn reiterated the firm Labatt commitment to assist and expand General Brewing in its operations.[59] The relative success of this assistance in the past is beside the point.[60]

Sale of the Azusa Plant

The court was presented with considerable data concerning the sale of the Azusa brewery to Miller. General Brewing submitted a detailed affidavit by its president, together with copies of Miller's offer to purchase and the resolution of acceptance. Counsel for General Brewing offered, in fact, to call Mr. Jess Nicks, General Brewing's president, to testify at the hearing, if necessary. There was full disclosure of the details and reasons for the trans-

59. Mr. Cronyn also submitted an affidavit in opposition to Schlitz's motion to reopen the record.

60. Schlitz intimates that the government helped thwart the purchase of General Brewing by Heilman Brewing Company. Schlitz misconstrues the form which General Brewing's eastward expansion will take. It certainly will not be by allowing itself to be swallowed up by other breweries.

action to the court. There was no disclosure to Schlitz prior to the hearing for obvious reasons.

The court characterized the sale as a business decision on the part of General Brewing management with which it chose, properly, not to interfere. It extended to counsel for Schlitz opportunities on two separate occasions to demonstrate how the transaction affected the issues in this case. It carefully evaluated Schlitz's contentions in this respect and found them lacking. In the sound exercise of its discretion, the court denied the motion. It found it "clear beyond cavil" that the sale was beneficial.[61]

Schlitz implies deception of the court by General Brewing. It states that the district court was led "to believe that the proceeds of the sale would be available to General Brewing for rehabilitation and possible expansion eastward."[62] This statement shades the facts. The court *was* informed, by sworn affidavit of General Brewing's president, that the proceeds would be applied against the outstanding loan,[63] thereby enabling it to eliminate heavy

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61. The court made the following observations concerning the sale:

> "(1) the agreement to sell was an exercise of General Brewing's independent business judgment, (2) consummation of the sale would leave General Brewing with more than adequate brewing capacity for all foreseeable increases in sales in all markets which it now taps, (3) General Brewing's receipt of $8,000,000 for the sale would materially strengthen its capacity to compete with all its competitors, including, notably, Schlitz, (4) the sale would improve General Brewing's ability to expand into other areas and (5) it would strengthen General Brewing as a vehicle for Labatt's competition in the U. S. market." Op., 253 F. Supp. at 132.

62. J.S., p. 11.

63. See Affidavit of Jess Nicks in Opposition to Motion to Reopen Record, p. 4:

> "Northwestern . . . had already consented to the sale upon condition that its loan be paid off. We are now making arrangements to pay off such loan in its entirety and in so doing we will save more than $450,000 in interest per year."

interest charges. The court recognized that the sale also aided General Brewing's rehabilitation by cutting down costly overhead. The court was not misled, but was fully informed of the intended use of the funds. It also was informed of the other substantial benefits accruing from the sale. The net effect was that General Brewing has been able to rehabilitate itself and, as soon as this litigation is settled, it can proceed with its expansion plans. General Brewing has always "admitted" what the proceeds would be used for, long prior to the other lawsuit referred to.[64]

The Acquisition of Burgermeister's Assets

At the time of the Schlitz acquisition, Burgermeister was a substantial, independent competitor, with substantial assets and modern brewing equipment.[65] In 1960, it was the third largest selling California brewery, accounting for 10.7 per cent of California's sales.[66] Schlitz has never contended that Burgermeister was a so-called "failing corporation."[67] Schlitz valued Burgermeister enough to outbid Miller Brewing Company by over $1,000,000, and paid over $12,000,000 for the Burgermeister assets.

Acquiring Burgermeister meant a lot to Schlitz. It was able to enter the Western beer market more effectively without expanding its own brewery or, as it had initially considered, introducing its Old Milwaukee popular-price beer.[68] It was also now able to offer a popular-price beer

64. The other lawsuit, *General Brewing Corp. v. Jos. Schlitz Brewing Co.*, Civil No. 42874 (N.D. Cal.), filed October 8, 1964, is a private treble-damage action by General Brewing against Schlitz for over $1,000,000 for regional price discrimination.

65. F. of F. Nos. 90 & 106.

66. F. of F. No. 86.

67. The district court made several findings of fact which demonstrate Burgermeister's essentially sound position at the time of the acquisition. See F. of F. Nos. 88-98.

68. F. of F. Nos. 113-18.

to its distributors, and thus concentrate both a premium and a popular-price beer within the more successful distributor outlets. And, unfortunately for General Brewing, it was able to cut more strongly into General Brewing's sales. Before the Burgermeister acquisition, one of Schlitz's officers, speculating on the effect of Schlitz's West Coast takeover, observed in an inter-office memorandum, "We could choose either the Schlitz or Burgie wholesaler. L. L. [Lucky Lager?] cannot do anything about it."[69]

Schlitz has long displayed anti-competitive tendencies in the California, Hawaiian and Eight-Western State markets as well as the Nation. Shortly after it had purchased the assets of Burgermeister, an apt description of the growing Schlitz empire appeared, with the blessing of Schlitz:

> "Schlitz intends to grow not merely by gobbling up or 'cannibalizing' some of the 225 surviving U. S. brewers, but by selling against them more strongly on national, regional and local levels."[70]

At the trial the president of Schlitz confirmed that description to be a correct statement of his company's goals. One wonders whether Schlitz informed the Antitrust Division of the Justice Department of these goals at its conference *prior to the Burgermeister acquisition.*

After the Burgermeister acquisition, Schlitz attempted to have its wholesalers carry a full line of Schlitz products.[71] This was in line with Schlitz's view that its wholesalers carry only its own brands.[72] Indeed, its president unwittingly revealed his company's preferences:

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69. Plaintiff's Exhibit 2; Tr., pp. 7-8.

70. Article, Sales Management, "How to 'General Motorize' a Beer Business" (August 17, 1962). Plaintiff's Exhibit 47.

71. F. of F. No. 107.

72. Tr., pp. 1270-71.

"As markets go down in size, it is very important for a wholesaler to have perhaps two or even more than two brands. So from a policy standpoint it would be nice if wholesalers could handle only one corporation brand."[73]

Schlitz moved quickly to consolidate the distributors of Burgermeister and Schlitz. This anti-competitive development radiated in turn further anti-competitive effects. Miller, for example, felt the consequences at any early stage, as many of its distributors lost the Burgermeister brand, and still others dropped the Miller brand.[74] By its impact on distributorship arrangements, the Burgermeister acquisition lessened the availability of other brands to retail outlets and consumers.

General Brewing was also injured by the Burgermeister acquisition. Its Los Angeles distributors, for example, lost the Schlitz brand.[75] A former president of General Brewing testified that as a result the distributors became less effective so that General Brewing's sales suffered a decline.[76]

In the first six months following the acquisition of Burgermeister, Schlitz, on its own initiative, terminated its relationship with 39 beer distributors in various market areas of the West. Of these, 14 were former Burgermeister distributors and 25 were former Schlitz distributors.[77]

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73. Tr., p. 1271.

74. The president of Miller testified that the Schlitz acquisition of Burgermeister had a definite, adverse effect on its distributors, and predicted that in the next five to ten years there would be an even further adverse effect "when the concentration of beer will tend towards the same brewery having one distributor handle its products in a given area." Tr., pp. 302-303.

75. Tr., pp. 1196-97.

76. Tr., p. 1203.

77. F. of F. No. 109.

Schlitz did meet with the Antitrust Division prior to the acquisition, but no positive action developed. Schlitz did not submit a written report for a written clearance, and it received no clearance.[78] Yet Schlitz has been acquainted with the Division's procedure in other contexts, since it merged with a Hawaiian and a Puerto Rican brewery only after obtaining written clearance.[79] In any event, oral clearances for mergers or acquisitions are simply not furnished by the Division.[80]

Schlitz makes the somewhat incomprehensible observation[81] that "on the facts of this case," there was no market share as to combined Schlitz-Burgermeister-General Brewing sales for the district court to consider as to both acquisitions. It would have been artificial in the extreme to consider Schlitz's market shares apart from Burgermeister in evaluating the anti-competitive effects of the Labatt-General Brewing acquisition. Schlitz offered no breakdown of sales as between the Schlitz and the Burgermeister brands after the 1961 purchase. As to gauging the effects of the Burgermeister acquisition, inclusion of the subsequent market shares of General Brewing could be considered as post-acquisition evidence confirming the probability of future anti-competitive effects. The Labatt-General Brewing acquisition occurred only three years after the Burgermeister acquisition. But more to the point, in considering the effect of the Burgermeister acquisition in each of the relevant market areas, the court relied upon market data

78. F. of F. No. 84.
79. F. of F. No. 85.
80. F. of F. No. 86.
81. J.S., p. 16, first footnote.

only as to Burgermeister's and Schlitz's sales (and not General Brewing's) as of the time of the purchase.[82]

The Procedures Below

Schlitz came fully prepared to trial. Schlitz introduced considerably more exhibits than the government and General Brewing together, and called more witnesses. The trial did not commence until 18 months after the action had been brought. Prior to trial, Schlitz invoked several discovery tools made available by the Federal Rules of Civil Procedure, although it allowed 11 months to lapse from the date of filing before making its first discovery moves. It submitted several written interrogatories to the government and General Brewing. It obtained production of several documents. Schlitz also utilized information obtained through a companion private treble-damage suit filed by General Brewing against Schlitz for regional price discrimination by Schlitz.[83]

The court's denial of Schlitz's motion to require General Brewing to furnish copies of documents came only after General Brewing had informed the court that it would comply with Schlitz's request except for revealing certain trade secrets. These documents were provided to Schlitz, and Schlitz used some of them in cross-examination of witnesses.

Schlitz must be somewhat uncomfortable in charging that it was prejudiced by lack of preparation. If it experienced any such inconvenience, it was self-inflicted. Schlitz deliberately changed its chief trial attorney only about 30 days before trial. Also, Schlitz asked for, and received,

82. See, *e.g.*, F. of F. Nos. 88, 101, 102, and 105.

83. *General Brewing Corp. v. Jos. Schlitz Brewing Co.*, Civil No. 42874 (N.D. Cal.), filed October 8, 1964.

four separate extensions of time for further discovery under Local Rule 2(a). None of its requests for additional time was denied.[84] And at the last minute it filed its motion to produce documents.

Schlitz hints that it might have uncovered Labatt's "true plans" for General Brewing if it had been allowed further discovery. But it does not explain how any information in the hands of General Brewing's executives would reflect the plans of Labatt management for General Brewing. Labatt's management testified, both at trial and by subsequent affidavit, of the company's true plans for General Brewing—to expand its commitment in the United States. Since the trial, the Labatt board of directors has not altered that position. Only two weeks prior to the filing of this Motion to Affirm, General Brewing's board adopted a resolution formally declaring that divestiture of control of General Brewing by Labatt at this time could have the effect of substantially reducing the sales and profits of this corporation and adversely affecting employee and executive morale, and the morale of wholesalers.[85]

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84. Schlitz's first extension of time, granted eight months after filing of the action, was until January 12, 1965. The other extensions were until March 16, 1965, March 29, 1965 and April 26, 1965, respectively.

85. This resolution was passed, by a vote of 6-2, at a special Board meeting held September 14, 1966 at the demand of two dissident directors. These latter directors were elected on April 6, 1966 by the votes of a minority shareholder who also owns Maier Brewing Company, a competitor of General Brewing. One is compelled to inquire: Have Schlitz and Maier Brewing been in communication regarding this suit?

THE QUESTIONS ARE MANIFESTLY UNSUBSTANTIAL

I.

Where Competition Is Adversely Affected Section 7 of the Clayton Act, as Amended, Forbids Acquisition of a Corporation, Whether Directly or Indirectly, Irrespective of Beneficial Effects, and It Would Be a Misinterpretation of the Statute to Entrust a Violator with Power to Devise Its Own Divestiture Remedies.

The district court expressed misgivings about the true motives of Schlitz's purchase of the Labatt stock. Assuming, though, that the purchase did in fact contemplate entry into the Canadian market, the law is clear that a merger or acquisition otherwise violative of Section 7 of the Clayton Act, as amended, is not cured by beneficial side effects. The theory of "countervailing power" has been expressly rejected by this Court. *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 370 (1963); *United States v. Bethlehem Steel Corp.,* 168 F. Supp. 576, 617-18 (S.D.N.Y. 1958). Nor do good intentions or motives insulate an otherwise proscribed acquisition. *United States v. E. I. du Pont de Nemours & Co.,* 353 U.S. 586, 601-02 (1957). The circumstance that Labatt is a foreign corporation does not affect this conclusion. The sole issue, as to the Labatt-General Brewing acquisition, is whether the reasonably probable effect of the acquisition will be to substantially lessen competition or tend to create a monopoly in the production and sale of beer in any of the relevant market areas. The district court had little difficulty in applying the principles first articulated by this Court in *Brown Shoe Co. v. United States,* 370 U.S. 294 (1962). The most recent applications of Section 7 by this Court[86] reinforce the correctness of the district court's decision. Schlitz cannot now

86. *United States v. Von's Grocery Co.,* 384 U.S. 270 (1966) and *United States v. Pabst Brewing Co.,* 384 U.S. 546 (1966).

bifurcate the package it bought by divorcing General Brewing from this Court's consideration of the whole transaction. If an acquisition violates Section 7 in any respect, then it must fall.

Schlitz's suggestion[87] for a private disposition of Labatt's General Brewing interest is simply unworkable. The district court readily concluded that.[88] It is not the province of a court, in applying the sanctions of Section 7, to create new antitrust problems. See *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 333 (1961). There is certainly no justification for permitting a violator of Section 7 to promote its own schemes for avoiding the proscriptions of the statute. *Cf. Matter of Diamond Alkali Co.*, Docket No. 8572, 3 CCH Trade Reg. Rep., para. 17,361 at pp. 22,577-78 (1965). Fashioning of the appropriate remedy properly belonged to the district court. *United States v. E. I. du Pont de Nemours & Co., supra* at 322.[89]

But the true vice of the question as posed by Schlitz is its studied avoidance of the district court's finding that Labatt is a potential competitor of Schlitz in the United States, regardless of its present sales volume in the United States. This Court has consistently held that potential competition also must be zealously safeguarded. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158 (1964).

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87. As noted previously, Schlitz's proposed decree made no suggestion of a conditional decree of divestiture.

88. Op., 253 F. Supp. at 148.

89. In the *du Pont* case, the district court's decree did not go far enough to redress the injury to competition. In *United States v. Crescent Amusement Co.*, 323 U. S. 173 (1944), the circumstance that the district judge had initially found a violation of law was said to enhance the deference owed to the district judge's determination of the measures appropriate to eliminate the violation. That factor was not present in the *du Pont* case. See *United States v. E. I. du Pont de Nemours & Co., supra* at 322 note 3.

II.

Antitrust Division's Three-Year Delay in Challenging the Burgermeister Acquisition Is Irrelevant, and Burgermeister Was Not Subject to the "Failing Corporation" Doctrine.

The district court was fully apprised by Schlitz of the latter's conference with the Antitrust Division prior to purchasing Burgermeister, and doubtless gave full consideration to this factor in its decision. In all events, inaction at the time by the Antitrust Division carries little evidentiary weight, particularly in view of the clear procedure for obtaining written clearances which Schlitz, as a businessman, knew about and chose to ignore. The lapse of only three years before the complaint was filed against Schlitz is almost insignificant when compared with other cases. *Cf. United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961).

If there was insufficient evidence by which to gauge the future effects of the Burgermeister acquisition in 1961, there certainly was ample evidence by 1964, when Schlitz resumed its policy of acquiring competitors in the context of an industry marked by a rapidly diminishing number of competitors. Post-acquisition events cast a more precise light upon the probable anti-competitive effects of an acquisition, and under all the circumstances then present in 1964, the Antitrust Division responded and filed its complaint.

It may be that a businessman's "orderly conduct of affairs" is indeed disrupted by late-coming antitrust action. But it

> "is enough [for this Court] that Congress feared that a market marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers would, slowly but inevitably gravitate from a market of many small competitors to one dominated by one or a few giants, and competition

> would thereby be destroyed. Congress passed the Celler-Kefauver Act to prevent such a destruction of competition. Our cases since the passage of that Act have faithfully endeavored to enforce this congressional command."[90]

Schlitz weakly requests this Court to review the procedure by which clearances are granted by the Antitrust Division. Schlitz does not ask that this Court lay down new rules for the proper role of such clearances. It is already clear that the government cannot be estopped to move against a proscribed merger or acquisition. *United States v. New Orleans Chapter, Associated Gen. Contractors,* 382 U.S. 17 (1965). The gist of Schlitz's request, for which no authority is cited, is rather as follows:

> "We do maintain, however, that a pre-merger clearance of the kind present here is entitled to evidentiary consideration in the event the government subsequently files suit and that some justification or change in circumstances should appear from the record if the evidence adduced in support of the complaint is the same information the Antitrust Division had before at the outset."[91]

The simple answer to this request is that the district court did take the Antitrust Division's inaction into consideration.[92] Also, there had been extensive change in the circumstances since the time the Burgermeister acquisition was first evaluated by the Antitrust Division. It should suffice to enumerate only a few of these: The continued trend towards concentration in the beer industry, and Schlitz's

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90. *United States v. Von's Grocery Co.,* 384 U. S. 270, 278 (1966).

91. J.S., p. 22.

92. F. of F. Nos. 83-86.

subsequent acquisition of Labatt and General Brewing. It would be unwarranted for the Antitrust Division to view the Burgermeister acquisition in a vacuum, artificially fixed at a prior point in time.

Schlitz's reliance on the recent case of *United States v. Von's Grocery Co.*,[93] is misplaced. The opinion in that case expressly noted that the merger there could not be defended on the ground that "one of the companies was about to fail or that the two had to merge to save themselves from destruction by some larger and more powerful competitor."[94] As the district court in the instant case found, Burgermeister was not insolvent and thus was not a "failing firm" within the meaning of *International Shoe Co. v. F.T.C.*, 280 U.S. 291 (1930). It was not even "deteriorating." And the duo certainly did not have to combine in order to fend off a more powerful competitor.

> "If ever such a merger would not violate § 7, certainly it does when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner-competitors which is exactly the sort of trend which Congress, with power to do so, declared must be arrested."[95]

Schlitz now argues that post-acquisition data "confirmed the wisdom of the Antitrust Division's 1961 assessment."[96] If anything, post-acquisition facts confirm the wisdom of the Antitrust Division's 1964 assessment, since, as already pointed out, Schlitz proceeded, in the same market areas, to acquire another competitor and has increased its share

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93. 384 U.S. 270 (1966).

94. *Id.* at 277. (Footnote omitted.)

95. *Id.* at 278.

96. J.S., p. 23.

of sales there. Further, as noted in *F.T.C. v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965):

> "If the post-acquisition evidence were given conclusive weight or allowed to override all probabilities, then acquisitions would go forward willy-nilly, the parties biding their time . . . . [T]he force of § 7 is still in probabilities, not in what transpired. That must necessarily be the case, for once the two companies are united no one knows what the fate of the acquired company and its competitors would have been but for the merger."

III.

Schlitz Was Not Foreclosed to Its Prejudice from Effective Pre-Trial Discovery, and the Trial Court Properly Refused to Reopen the Record in the Exercise of Its Discretion.

Schlitz was able to present evidence relating to all of the issues in this case. It marshalled more exhibits and more witnesses than the government and General Brewing combined. It even used the vehicle of a companion private-treble damage suit filed by General Brewing against it to develop further evidence in this case. The court acted within its discretion in denying Schlitz's motion for further discovery, particularly after having granted four previous motions for extensions of time for Schlitz to prepare for trial, and the reviewing court in such circumstances should not decide whether it would, in the first instance, have permitted the discovery prayed for, but whether there is evidence to support the decision. *Tiedman v. American Pigment Corp.*, 253 F.2d 803, 808 (4th Cir. 1958).

What Schlitz really complains about is that it was unable to exert its voting control over Labatt long enough to have the latter's interest in General Brewing disposed of, thereby permitting Schlitz to accomplish its goals of eliminating substantial competition in the Western markets. The government and General Brewing naturally resisted all such at-

tempts to influence Labatt management, and the court acted within its discretion in denying any modification of the temporary restraining order. *United States v. Ingersoll-Rand Co.*, 320 F.2d 509, 523 (3d Cir. 1963); *United States v. Pennzoil Co.*, 252 F. Supp. 962, 986 (W.D. Pa. 1965).

Further, the district court did consider evidence relating to the sale of the Azusa plant by General Brewing to Miller. Schlitz was given two separate occasions on which to show how any evidence relating to the sale could affect any of the issues in this case. Counsel for Schlitz could only speculate at most, and assert that the sale "proved" its contentions that Labatt meant to destroy General Brewing. Yet General Brewing's president submitted concrete facts showing the clear and immediate financial advantages accruing from the sale, and Labatt management reaffirmed its intent to assist General Brewing. It is difficult to imagine what Schlitz could have accomplished if it had been granted its request for an unlimited reopening of the record. The only certain result would have been further delay in the disposition of this case to the detriment of General Brewing. For this reason, General Brewing opposed the request.

After a case is closed, the decision of whether or not it should be reopened lies within the sound discretion of the trial court. *Reconstruction Fin. Corp. v. Commercial Union of America Corp.*, 123 F. Supp. 748, 750 (S.D.N.Y. 1954). Since the trial court "has the feel for the case that an appellate court can seldom have . . ., [its] ruling is subject to reversal only in a rare case where abuse is clearly shown . . . ." *Caracci v. Brother Int'l Sewing Mach. Corp.*, 222 F. Supp. 769, 771 (E.D. La. 1963), *aff'd*, 341 F.2d 377 (5th Cir. 1965). Schlitz's request was not limited, but sought an open-end reopening of the record. If Section 7 cases are to foster competition rather than stifle it, there must be a decision at

some point rather than unsettling uncertainty. *Cf. United States v. Imperial Chem. Indus., Ltd.*, 1957 Trade Cases, para. 68,859 at p. 73,476 (S.D.N.Y. 1957). Protracted antitrust litigation should be concluded as soon as possible. *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 335 (1961).

IV.

The Trial Court's Findings of Fact and Conclusions of Law Were Properly Made.

Perhaps stung by its total inability to produce *credible* evidence to support its unrealistic contentions at trial, Schlitz now impugns the findings of fact and conclusions of law at which the district court arrived. It makes the unsupported assertion that the findings of fact and conclusions of law entered below were not prepared by the district court.

The district court ordered all of the parties to submit proposed findings of fact and conclusions of law as part of their post-trial submission. Schlitz, voicing no objection to this procedure, lodged 158 proposed findings of fact and conclusions of law with the court. The district court expressly stated in its opinion that it had reviewed each of the parties' submissions:

> "Each set has been reviewed by the trial court. While those proposed by the United States and by General Brewing have provided the basic pattern for the trial court's own Findings and Conclusions, *the latter are the product of careful sifting.* They incorporate many substantial additions, deletions and revisions as well as numerous other changes including citations to the record. It is believed that the Findings, Conclusions and comments show the reasoning which led this court to its decision on all relevant issues."[97]

97. Op., 253 F. Supp. at 131. (Emphasis added.)

The situation in the present case is markedly different from *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964), where the trial judge had not written an opinion but had requested prevailing counsel to prepare the findings, conclusions and judgment, which it adopted verbatim. Nevertheless, this Court in that case still concluded that "those findings, though not the product of the working of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence."[98] In this case all of the parties were required to submit summaries of the trial transcript for the preceding days, and the district court was elaborately informed with respect to the significance of all proferred evidence. Finally, no one who reads the transcript can in good faith argue with the proposition that the trial judge reached his own decisions in frequent disagreement with the parties. The truth is that the findings and conclusions are the product of the court.

CONCLUSION

The Jurisdictional Statement of Schlitz does not raise novel issues of law, but is predicated solely upon assumption of facts decided adversely to Schlitz, which it now seeks to relitigate in this Court. For these reasons, the judgment of the district court should be affirmed on the ground that it is manifest that the questions on which the

98. *Id.* at 656.

decision of this cause depends are so unsubstantial as not to need further argument.

Dated: September 23, 1966.

Respectfully submitted,

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Of Counsel

Appendix A

CALIFORNIA BREWERS ASSOCIATION

155 Montgomery Street, San Francisco, California 94104

August 24, 1966

To: Members and Directors of the
California Brewers Association

Re: Statistical Report #1—Sales of Beer Produced in California—Month of July, 1966

Attached for your information and files is the California Brewers Association STATISTICAL REPORT #1—SALES OF BEER PRODUCED IN CALIFORNIA—for the month of July, 1966, and calendar year to date.

Very truly yours,

/s/ GEO. W. OSOSKE
Geo. W. Ososke
Executive Secretary

CALIFORNIA BREWERS ASSOCIATION

155 Montgomery Street, San Francisco, California 94104

Statistical Report #1, Page 1

Sales of Beer Produced in California
(In Barrels)

Month of July, 1966

California Breweries	Through July 31, 1966 — Calif. Sales & Exports	Through July 31, 1966 — Calif. Sales	MONTH OF JULY — Calif. Sales & Exports 1966	MONTH OF JULY — California Sales 1966	MONTH OF JULY — California Sales 1965	MONTH OF JULY — EXPORTS 1966	MONTH OF JULY — EXPORTS 1965
Jos. Schlitz	1,054,424	751,853	184,932	133,896	104,727	51,036	31,168
Anheuser-Busch	1,113,266	728,629	163,448	111,396	107,662	52,052	51,584
Theo. Hamm	801,371	641,385	134,559	110,050	97,076	24,509	27,774
General Brewing	721,296	581,325	115,228	92,317	92,452	22,911	18,868
Pabst Brewing	496,593	326,289	74,986	51,840	59,717	23,146	22,409
Maier Brewing	287,587	272,393	42,093	39,439	49,933	2,654	3,340
Falstaff Brewing	293,929	181,401	38,523	28,391	25,902	10,132	8,154
Grace Bros.	60,307	56,863	8,963	8,593	11,752	370	261
Steam Beer	707	707	107	107	85	—	—
	4,829,480	3,540,845	762,839	576,029	549,306	186,810	163,558

California Production (Exports included)

Percentage Packaged Beer—JULY 1966—81.51% JULY 1965—79.89%
Percentage Draught Beer—JULY 1966—18.49% JULY 1965—20.11%

CUMULATIVE SALES

	California Breweries
In California to date, 1966	3,540,845
In California, same period 1965	3,356,890
INCREASE	183,955
Percent	5.5%

(Page 2)

Sales of Beer Produced in California

January 1 through July 31, 1966

(In Barrels)

	COMPARATIVE CALIFORNIA SALES — Through July 31		— Increase or Decrease —		Exports — Through July 31	
	1966	1965	Barrels	Percent	1966	1965
Jos. Schlitz	751,853	630,018	121,835	19.3%	302,571	202,465
Anheuser-Busch	728,629	684,495	44,134	6.4	384,637	320,349
Theo. Hamm	641,385	564,187	77,198	13.7	159,986	144,816
General Brewing	581,325	569,342	11,983	2.1	139,971	123,608
Pabst Brewing	326,289	350,396	—24,107	— 6.9	170,304	88,142
Maier Brewing	272,393	315,966	—43,573	—13.8	15,194	17,334
Falstaff Brewing	181,401	166,408	14,993	9.0	112,528	65,563
Grace Bros.	56,863	75,569	—18,706	—24.8	3,444	1,939
Steam Beer	707	509	198	38.9	—	—
Totals	3,540,845	3,356,890	183,955	5.5%	1,288,635	964,216

Sales by California Breweries*

(In Gallons)

Month of July, 1966

	California Taxable Sales	Export Sales	California — Military Sales — Direct	By Distrs.	Total Sales	Percent of Total	Bottles & Cans	Draught
Jos. Schlitz	4,035,845	1,582,108	6,300	108,629	5,732,882	24.24	4,862,262	870,620
Anheuser-Busch	3,386,474	1,613,622	11,529	55,276	5,066,901	21.43	3,442,524	1,624,377
Theo. Hamm	3,253,896	759,765		157,663	4,171,324	17.64	3,511,047	660,277
General Brewing	2,806,108	710,236		55,722	3,572,066	15.11	3,102,400	469,666
Pabst Brewing	1,551,801	717,523	4,713	50,536	2,324,573	9.83	1,784,258	540,315
Maier Brewing	1,216,146	82,275	6,361	101	1,304,883	5.52	1,292,002	12,881
Falstaff Brewing	816,429	314,096	17,674	46,012	1,194,211	5.05	1,004,127	190,084
Grace Bros.	266,368	11,494			277,862	1.17	276,397	1,465
Steam Beer	3,317				3,317	.01		3,317
	17,336,384	5,791,119	46,577	473,939	23,648,019	100.00	19,275,017	4,373,002

*California law presumes that beer is sold upon removal from the Internal Revenue Bonded Premises; consequently this report does not necessarily reflect actual sales or consumption.

CALIFORNIA BREWERS ASSOCIATION

155 Montgomery Street, San Francisco, California 94104

August 25, 1966

To: Members and Directors of the
California Brewers Association

Re: Statistical Report #2—Total Beer Sales in California
Including Imports—Month of July, 1966

Attached for your information and files, is the California Brewers Association STATISTICAL REPORT #2—TOTAL BEER SALES IN CALIFORNIA INCLUDING IMPORTS—for the month of JULY, 1966, and calendar year to date.

Very truly yours,

/s/ GEO. W. OSOSKE
Geo. W. Ososke
Executive Secretary

California Brewers Association
Statistical Report #2, Page 1
August 25, 1966

Total Beer Sales in California Including Imports
Months of July 1966 and July 1965
(In Barrels)

Brewing Companies	MONTH OF JULY 1966 — Calif. Production Sold in Calif.	Shipments into Calif.	Total Sales in Calif. Barrels	Total Sales in Calif. Percent of Total	MONTH OF JULY 1965 — Calif. Production Sold in Calif.	Shipments into Calif.	Total Sales in Calif. Barrels	Total Sales in Calif. Percent of Total	July 1966/July 1965 — Total Sales in Calif. — Increase or Decrease — Barrels	Percent
1. Adolph Coors	—	170,752	170,752	17.5%	—	171,343	171,343	18.5%	— 591	— 0.3%
2. Olympia Brewing	—	150,298	150,298	15.4	—	139,646	139,646	15.1	10,652	7.6
3. Jos. Schlitz	133,896	1,012	134,908	13.8	104,727	2,046	106,773	11.5	28,135	26.4
4. Anheuser-Busch	111,396	869	112,265	11.5	107,662	777	108,439	11.7	3,826	3.5
5. Theo. Hamm	110,050	169	110,219	11.3	97,076	—	97,076	10.5	13,143	13.5
6. General Brewing	92,317	13,909	106,226	10.9	92,452	91	92,543	10.0	13,683	14.8
7. Pabst Brewing	51,840	27	51,867	5.3	59,717	—	59,717	6.5	— 7,850	—13.1
8. Maier Brewing	39,439	—	39,439	4.0	49,933	—	49,933	5.3	—10,494	—21.1
9. Falstaff Brewing	28,391	—	28,391	2.9	25,902	—	25,902	2.8	2,489	9.6
10. Miller Brewing	—	21,423	21,423	2.2	—	20,274	20,274	2.2	1,149	5.7
11. National Brewing	—	10,107	10,107	1.0	—	6,478	6,478	0.7	3,629	56.0
12. Grace Bros.	8,593	—	8,593	0.9	11,752	—	11,752	1.3	— 3,159	—26.9
13. Pearl Brewing	—	8,296	8,296	0.9	—	9,818	9,818	1.1	— 1,522	—15.5
14. Sicks' Rainier	—	5,084	5,084	0.5	—	5,750	5,750	0.6	— 666	—11.6
15. Carling	—	2,682	2,682	0.3	—	4,592	4,592	0.5	— 1,910	—41.6
16. Steam Beer	107	—	107	0.0	85	—	85	0.0	22	25.9
17. Other US Co.'s	—	9,555	9,555	1.0	—	11,144	11,144	1.2	— 1,589	—14.3
18. Outside USA	—	5,869	5,869	0.6	—	4,839	4,839	0.5	1,030	21.3
Total Sales	576,029	400,052	976,081	100.0%	549,306	376,798	926,104	100.0%	49,977	5.4%
Percentages	59.0%	41.0%	100.0%		59.3%	40.7%	100.0%			

California Brewers Association
Statistical Report #2, Page 2
August 25, 1966

Total Beer Sales in California Including Imports
(In Barrels)
In Calendar Year to July 31, 1966 and July 31, 1965

Brewing Companies	YEAR TO JULY 31, 1966 — Calif. Production Sold in Calif.	Shipments into Calif.	Total Sales in Calif. — Barrels	Total Sales in Calif. — Percent of Total	YEAR TO JULY 31, 1965 — Calif. Production Sold in Calif.	Shipments into Calif.	Total Sales in Calif. — Barrels	Total Sales in Calif. — Percent of Total	Calendar Year to 7/31/66-7/31/65 — Increase or Decrease — Barrels	Increase or Decrease — Percent
1. Adolph Coors	—	966,656	966,656	16.5%	—	910,411	910,411	16.6%	56,245	6.2%
2. Olympia Brewing	—	875,228	875,228	15.0	—	780,209	780,209	14.2	95,019	12.2
3. Jos. Schlitz	751,853	4,113	755,966	12.9	630,018	14,800	644,818	11.7	111,148	17.2
4. Anheuser-Busch	728,629	5,185	733,814	12.6	684,495	4,438	688,933	12.5	44,881	6.5
5. Theo. Hamm	641,385	169	641,554	11.0	564,187	—	564,187	10.3	77,367	13.7
6. General Brewing	581,325	21,937	603,262	10.3	569,342	128	569,470	10.4	33,792	5.9
7. Pabst Brewing	326,289	179	326,468	5.6	350,396	65	350,461	6.4	—23,993	— 6.8
8. Maier Brewing	272,393	—	272,393	4.6	315,966	—	315,966	5.7	—43,573	—13.8
9. Falstaff Brewing	181,401	—	181,401	3.1	166,408	—	166,408	3.0	14,993	9.0
10. Miller Brewing	—	168,446	168,446	2.9	—	180,614	180,614	3.3	—12,168	— 6.7
11. National Brewing	—	61,923	61,923	1.0	—	32,869	32,869	0.6	29,054	88.4
12. Grace Bros.	56,863	—	56,863	1.0	75,569	—	75,569	1.4	—18,706	—24.8
13. Pearl Brewing	—	52,381	52,381	0.9	—	52,080	52,080	0.9	301	0.6
14. Sicks' Rainier	—	33,386	33,386	0.6	—	37,434	37,434	0.7	— 4,048	—10.8
15. Carling Brewing	—	16,236	16,236	0.3	—	27,033	27,033	0.5	—10,797	—39.9
16. Steam Beer	707	—	707	0.0	509	—	509	0.0	198	38.9
17. Other US Co.'s	—	54,652	54,652	0.9	—	59,268	59,268	1.1	— 4,616	— 7.8
18. Outside USA	—	44,727	44,727	0.8	—	36,064	36,064	0.7	8,663	24.0
Total Sales	3,540,845	2,305,218	5,846,063	100.0%	3,356,890	2,135,413	5,492,303	100.0%	353,760	6.4%
Percentages	60.6%	39.4%	100.0%		61.1%	38.9%	100.0%			

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 486

JOS. SCHLITZ BREWING COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND GENERAL BREWING COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of the district court which held that appellant, the Joseph Schlitz Brewing Company ("Schlitz"), the nation's second largest brewer, violated Section 7 of the Clayton Act, 15 U.S.C. 18, by acquiring all of the assets of the Burgermeister Brewing Corporation ("Burgermeister") in 1961, and 39.3 percent of the common stock of John Labatt, Ltd. ("Labatt") in

1964. The judgment requires Schlitz to dispose of its interest in Burgermeister and to divest its holdings of Labatt stock.

THE FACTS

The Brewing Industry. Since the repeal of prohibition, the number of brewing companies operating in the United States has declined radically. In 1952, there were 307 brewing companies; in 1964, only 144 (Fdg. 43, J.S. 13a). As the number of producers has declined, concentration of beer sales among the larger firms has increased. The ten leading brewers accounted for approximately 40 percent of total domestic beer sales in 1953 and 60 percent in 1963. The leading twenty-five brewers increased their market share during the same 10-year period from 57 percent to 82 percent (Fdg. 44, J.S. 13a).

This "steady trend toward economic concentration" (*United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 550) has been characterized by the acquisition of prosperous regional firms by the largest firms in the industry (Fdg. 48, J.S. 13a–14a). Concentration in regional markets, which is steadily increasing (PX 28;[1] Fdg. 46, J.S. 13a), is often higher than in the national market. Thus, in 1963, while the nation's ten largest firms accounted for 60 percent of all beer sold nationally (Fdg. 44, J.S. 13a), the ten largest brewers in the relevant eight-State western market accounted for more than 86 percent (PX 29; App. B

[1] Citations to Plaintiff's Exhibits (PX), and to the Transcript (Tr.), are to the record, which has not been printed, but is lodged in the office of the Clerk of this Court.

infra, p. 31),[2] and California's ten largest brewers accounted for 94 percent of all beer sold in that region (PX 32; App. C, *infra,* p. 51). Finally, barriers to entry are very high in the beer industry (Fdg. 49, J.S. 14a).

Acquisition of Burgermeister. Schlitz—the second largest brewer in the nation at the time of both acquisitions involved here—is a firm with annual sales in excess of $300 million (Fdg. 38, J.S. 12a (1964 sales)). Its share of national beer sales rose from 6.5 percent (prior to the acquisition of Burgermeister) to 10.45 percent (after the acquisition of General Brewing) (App. A, *infra,* p. 27).

In the years immediately prior to 1960, Schlitz was not very successful in selling its premium brand in the large, rapidly growing West Coast beer market. By 1960 Schlitz, the second brewer in the nation, ranked only eleventh in California, accounting for 3.9 percent of all sales in that State. Schlitz determined that "the need for a second brand—a popular priced one—on the West Coast is great" (PX 2, p. 2). It seriously considered introducing its own brand, Old Milwaukee, into California to increase its sales there, but ultimately decided to acquire Burgermeister instead (Fdg. 116–118, J.S. 25a).

Burgermeister, producer of the very popular Burgermeister brand beer, was a strong competitor on the West Coast (Fdg. 95, J.S. 21a). Although it sold beer only in the West, and mostly in California, it had for many years competed successfully against national brewers (App. C. *infra,* pp. 33, 35–50). In

[2] "App." references are to Appendices A–D to the district court's opinion which are reprinted as Appendices A–D to this motion.

1960 the Miller Brewing Company offered to buy Burgermeister after investigation revealed that Burgermeister had a "good product, a good plant and the strongest distributor organization of any of the brewers in the state" (Tr. 158). On December 29, 1961, Schlitz bought all of the assets of Burgermeister for $12,039,250 (Fdg. 97, J.S. 22a).

Shortly before the acquisition, Schlitz, in response to a Department of Justice request, submitted to the Department certain information. After considering this information, officials of the Department orally advised counsel for Schlitz that the Department was not prepared to take any action at that time to block the acquisition, and, in fact, the Department took no action for two years (Fdg. 83, J.S. 19a–20a). Schlitz was aware that the Department of Justice maintained a formal procedure for reviewing business transactions under which a written request is made for a statement of the Department's intent and the Department gives a written statement to the effect that it can or cannot assure the requesting party that it then does not intend to bring suit (Fdgs. 83–86, J.S. 19a–20a). Schlitz did not invoke this procedure. As the trial judge found, the record in this case "is barren of any proof that the Department of Justice gave clearance to the acquisition of Burgermeister by defendant, Schlitz" (Fdg. 84, J.S. 20a).

The acquisition combined Schlitz, the eleventh largest brewer in California,[3] with 3.9 percent of all sales, and Burgermeister, the third largest brewer, with 10.7 percent of all beer sales. This gave Schlitz 14.6 per-

[3] See *infra* p. 11 and n. 11 for the relevant geographical markets found by the district court.

cent of the California market (Fdgs. 101–102, J.S. 22a–23a).[4] The acquisition also united the seventh largest and the eleventh largest brewers in the eight western States and increased Schlitz's share of that market from 5.7 percent to 9 percent (App. B, *infra*, pp. 28–30).[5]

The Acquisition of Labatt. Labatt is the third largest brewer in Canada; it sold 21.6 percent of all beer in Canada in 1964 (Tr. 633). Labatt engages in interstate commerce in this country (Fdg. 76, J.S. 18a), and sells about $2 million worth of beer in the United States annually (Fdg. 68, J.S. 17a). Labatt controls 63.5 percent of the common stock of General Brewing Company ("General Brewing") (Fdg. 41, J.S. 12a).

In February 1964, Schlitz bought 39.3 percent of Labatt's stock, thereby obtaining control both of Labatt and of General Brewing (Fdgs. 39–41, J.S. 12a). While Schlitz claimed that it was interested in Labatt only because it wished to enter the Canadian beer market, the evidence on this point was disputed. The trial court (J.S. 38a) was "not con-

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[4] Market shares used here are based on 1960 sales of Burgermeister. Appellant's figures differ slightly because it uses market share figures for 1961. The district court found that Burgermeister's 1961 sales figures "are not reliable indicia of the effect of the * * * acquisition * * * because such sales were seriously distorted by the demoralizing effect of awareness, in the industry, its distributors and corporate personnel, of negotiations for the sale of Burgermeister which commenced in 1960" (Fdg. 104, J.S. 23a).

[5] The figures for the eight-State western market are drawn from 1961 sales data, despite the problem noted in n. 4, because the record does not contain 1960 sales figures for this regional market.

vinced [that,] from the outset of its negotiations with Labatt, Schlitz had no desire to control General Brewing. If this were true, Schlitz could have gone a great deal further in making sale of General Brewing a prerequisite for its purchase of Labatt stock."

The acquisition had the following effects. Nationally, it united Schlitz, the second largest brewer, with 8.35 percent of sales (in 1963), and General Brewing, the fourteenth largest brewer, accounting for 2.1 percent of sales (App. A, *infra,* p. 27), making Schlitz the nation's largest brewer with 10.45 percent of the market and giving the two leading brewers more than 20 percent (Fdg. 50, J.S. 14a). In the eight western States, the acquisition joined Schlitz, the fourth largest firm, with 10.0 percent of the market, and the second largest firm, General Brewing, with 13.3 percent of the market thereby making Schlitz by far the largest firm in that market with a 23.3 percent share (PX 29). In California, Schlitz, in 1963 the third largest brewer with a market share of 13.1 percent, by acquiring General Brewing, the second largest, increased its market share to 26.8 percent and became California's largest brewer—nearly twice as large as its closest rival (PX 32; Fdg. 56, J.S. 15a). In Hawaii, where General Brewing had long been the dominant brewer, accounting for 41.2 percent of all beer sales (in 1963), Schlitz's market share increased from 9.7 percent to 50.9 percent (PX 34; Fdg. 58, J.S. 15a).[6]

[6] Prior to the acquisition of Labatt and General Brewing, Schlitz had purchased the Hawaii Brewery Corporation, which had 10.8 percent of beer sales in Hawaii. If this share should

Labatt had planned to introduce its own premium-brand Labatt beer more widely in the United States, using the facilities of General Brewing (Fdg. 64, J.S. 16a) to overcome the high barriers to entry into the United States beer market (Fdg. 49, J.S. 14a). Labatt had also formulated, and partly put into effect, plans to expand General Brewing eastward to become a national brewer, and in connection with those plans had provided General Brewing with valuable practical and technical assistance (Fdgs. 61–64, J.S. 16a). The acquisition thus united a leading American brewer and two important potential competitors (Fdgs. 65–66, J.S. 16a–17a).

THE PROCEEDINGS

The Temporary Restraining Order. On February 19, 1964, the government filed a complaint challenging Schlitz's acquisition of Burgermeister and its proposed acquisition of Labatt. On the same day the government asked for a temporary restraining order to prevent the Labatt acquisition from being consummated. An order was entered—too late to prevent the Labatt acquisition—which, with Schlitz's acquiescence, enjoined Schlitz from exercising control over either Labatt or General Brewing.[7] On February 24 and 26, 1964, the court extended the order for an indefinite period with the consent of all parties.

had included in the market share of Schlitz, the latter would have had 20.5 percent before, and 61.7 percent after, acquiring General (PX 34).

[7] Schlitz's counsel told the court:

"What I am saying to the court, so that there is no mistake about this, is that we will be willing to bring the certificate out

Schlitz first asked to modify the temporary restraining order on April 21, 1965—more than a year after the government's complaint was filed—to allow it to negotiate a sale of General Brewing to the Heileman Brewing Company. After a full hearing the court accepted the government's argument that to allow Schlitz to sell General Brewing would decide in advance of trial one of the case's principal issues (Tr. of Pre-Trial Hearing, April 21, 1965, pp. 24–29, 34)—whether in order to eliminate the anticompetitive effects of the Labatt acquisition Schlitz should be required to sell both Labatt and General Brewing together. The district court denied defendant's motion because it believed that this issue could be better decided after the trial, which the court urged the parties to bring on promptly. (Tr. of Pre-Trial Hearing, April 21, 1965, pp. 53–55).

Depositions. In October 1964, eight months after filing its complaint, the government completed its discovery and filed a motion to set the case for trial under local Rule 2 [8] which provides that, unless the court grants additional time, all discovery must be completed within 10 days (Plaintiff's Memorandum to Set the Case, October 19, 1964). In October and December 1964, Schlitz asked for and was granted additional time for discovery. In January 1965, nearly a year after the filing of the complaint, Schlitz commenced

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here, we will be willing that this Court's order will be understood to mean that we exercise no rights incident to it, no dominion, don't vote it as stockholders and that the exact status quo at that time be maintained whether the hearing on the injunction is within the 10 days or a longer time." (Tr. of Pretrial proceedings, Feb. 20, 1964, pp. 30–31.)

[8] Rule 2, Rules of District Court of the Northern District of California.

discovery proceedings. On February 15, 1965 the government gave Schlitz a list of persons from whom its witnesses would be drawn, but Schlitz made no move to depose any of them. In February and again in March, Schlitz asked for and was given additional discovery time. On April 21, 1965, Schlitz agreed that no more discovery time was necessary (Tr. of pre-trial hearing, April 21, 1965, pp. 6–7), and on May 24 it stated that it would have "no problem" going to trial the third week in August. (Tr. of Pre-trial conference, May 24, 1965, pp. 170–171.) Seven weeks before trial, on June 22, 1965, recognizing that a special dispensation from the trial judge was necessary,[9] Schlitz requested him to grant additional time to depose five more witnesses. After a full hearing on this motion, the trial judge, after hearing that Schlitz had already deposed two of these five witnesses in a parallel private antitrust action, held that, since Schlitz had neither shown a particular need for the depositions nor explained why it had not taken them earlier and since further delay in the trial date might injure General Brewing, no further depositions would be allowed without the consent of all parties. (See Tr. of Pre-trial conference, June 22, 1965 pp. 264–272.)

Schlitz's Motion to Reopen the Trial. On February 18, 1966, five months after the close of trial and two

[9] Counsel for Schlitz stated:

"But as we understand the situation, it may be that we are in the state of pre-trial where we are no longer allowed to take depositions, and it was with that in mind that I approached counsel and they said no, they would not agree to it." (Tr. of Pre-trial conference, June 22, 1965, p. 265.)

months after the filing of all post-trial briefs, Schlitz moved that the trial be reopened to take new evidence concerning General Brewing's proposed sale of one of its four breweries to the Miller Brewing Company. Schlitz argued that this sale showed that General Brewing was a "failing firm" and not a significant potential competitor capable of expanding into new sections of the country (Post-Trial Hearing, February 18, 1966, pp. 1–28). At a full hearing on Schlitz's motion, affidavits were presented showing that General Brewing proposed to sell only a portion of its excess production capacity and that such a sale was a prudent business step reducing General's excessive overhead expenses while providing it with capital to retire debt or improve its efficiency (Post-Trial Hearing, March 10, 1966, pp. 8–50). The affidavits also indicated that General Brewing retained sufficient excess capacity for it to expand. (J.S. 3a–4a; Tr. of hearing of March 10, 1966, pp. 32–36; affidavit of Jess Nicks, March 9, 1966.) The trial court concluded that Schlitz's theories were unsupported by any evidence, that they conflicted with the evidence offered by affidavit and that Schlitz had not shown any reason to believe that the affidavits might be contradicted at trial,[10] and denied Schlitz's motion.

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[10] The trial judge stated to Schlitz's attorney:

"If the Court was convinced that anything before it, on the basis of your motion, might have any real impact—might have—upon any of the fourteen issues upon which this matter was tried, the Court would give consideration to your motion. * * * But, you haven't suggested one thing, except the vaguest sort of conjecture, that is contrary to what is unqualified and happens to be before the Court now." (Tr. of hearing of March 10, 1966, pp. 22–23.)

The Decision. The district court held that Schlitz's acquisition of Burgermeister and its acquisition of Labatt each violated Section 7 of the Clayton Act. The court found that beer was the relevant line of commerce (Fdg. 16, J.S. 8a), and that the relevant geographic markets in which to consider the competitive effects of each of the acquisitions consisted of (1) the United States as a whole (Fdg. 17, J.S. 8a), (2) eight western States (Fdg. 27, J.S. 10a),[11] (3) the State of California (Fdg. 33, J.S. 11a), and (4) the State of Hawaii (Fdg. 34, J.S. 11a).

Both in California and in the eight western States the Burgermeister acquisition had significantly increased concentration in the brewing industry—an industry showing a pronounced trend towards concentration (Fdg. 44, J.S. 13a; Fdg. 122, J.S. 26a). In addition, since Schlitz, had it not acquired Burgermeister, would have introduced its own brand—Old Milwaukee—into the West Coast market, the acquisition eliminated significant potential competition (Fdg. 120, J.S. 26a). Finally, the acquisition allowed Schlitz to hinder new entry into the beer industry by tying up a large number of beer wholesalers and making it difficult for those wholesalers to handle beers of other brewers (Fdgs. 107–112, J.S. 23a–25a).

The district court based its conclusion that the Labatt acquisition was illegal primarily on the ground

[11] California, Oregon, Washington, Idaho, Montana, Nevada, Utah a[redacted]rizona.

that the acquisition significantly increased concentration in the United States, in the eight western States, in California, and in Hawaii (Fdg. 67, J.S. 17a). The court also held that the acquisition threatened to suppress the substantial potential competition offered by Labatt and by General Brewing in the United States (Fdgs. 64–66, J.S. 16a–17a).

ARGUMENT

Appellant does not dispute the district court's holding that Schlitz's acquisition of the Labatt-General Brewing complex violates Section 7 of the Clayton Act. Indeed, since the acquisition would increase Schlitz's share of the Hawaiian beer market from 9.7 to 50.9 percent,[12] its share of the California market from 13.1 to 26.8 percent, and its share of the eight-State western market from 10 to 23.3 percent (see PX 26–30, 32–34; Fdgs. 53, 55–57, J.S. 14a–15a), its illegality is plain. See *United States* v. *Pabst Brewing Co.*, 384 U.S. 546; *United States* v. *Von's Grocery Co.*, 384 U.S. 270.

It is also clear, we submit, that Schlitz's acquisition of Burgermeister is illegal. The acquisition united California's third largest brewery, accounting for 10.7 percent of all sales, with the eleventh largest, accounting for 3.9 percent of all sales (Fdgs. 101–104, J.S. 22a–23a), and removed Schlitz as a potential competitor that was prepared to introduce a second brand in the California market (Fdgs. 113–120, J.S. 25a–26a). See *United States* v. *Penn-Olin Chemical*

[12] The actual market shares for Schlitz were 20.5 percent before and 61.7 percent after the acquisition of General. See *supra*, n 5.

Co., 378 U.S. 158. The "failing company" doctrine of *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291, cannot justify this merger, for Burgermeister was in no sense "failing"[13] but was a healthy competitor[14] (see Fdgs. 90–98, J.S. 21a–22a; J.S. 39a).

Appellant's principal contentions are three, none of which, we submit, warrants plenary review: first, that the trial judge abused his discretion in requiring Schlitz to divest the Labatt shares it had acquired instead of allowing Schlitz to retain Labatt and sell only General Brewing; second, that the government may not attack Schlitz's acquisition of Burgermeister without showing "some justification or change in circumstances" (J.S. 22) because the government "cleared" the transaction in 1961; third, that the district court made various procedural errors that deprived appellant of a fair trial.

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[13] Even had Burgermeister been failing, however, it is doubtful whether the *International Shoe* doctrine would apply, for the Miller Brewing Company—whose share of the California market was insignificant—also offered to buy Burgermeister. We believe that a failing firm may merge with a principal competitor only if there is no other prospective purchaser. See *United States* v. *Diebold, Inc.*, 369 U.S. 654; *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291, 302.

[14] Appellants argue that Burgermeister's market share should be discounted in view of the fact that Burgermeister was a "declining" company. We deny that any such discounting would be proper, for Burgermeister remained a strong, healthy company and any decline was insignificant (Fdg. 87–98, J.S. 20a–22a). But, even were Burgermeister's market share to be discounted by as much as 50 percent, the acquisition would still be illegal. *United States* v. *Von's Grocery Co.*, 384 U.S. 270; *United States* v. *Pabst Brewing Co.*, 384 U.S. 546.

1. A trial judge is "invested with large discretion" in fashioning relief in an antitrust case (*International Salt Co.* v. *United States,* 332 U.S. 392, 400–401; see *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 185; *United States* v. *National Lead Co.,* 332 U.S. 319, 334), and "it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor" (*United States* v. *duPont & Co.,* 366 U.S. 316, 334). The relief decreed in the present case, adopted by the trial judge at the suggestion of the government, represents a sound exercise of judicial discretion. The district court has simply ordered Schlitz to divest the Labatt stock it acquired, and the "very words of § 7 suggest that an undoing of the acquisition is a natural remedy." *United States* v. *duPont & Co., supra,* at 329.

Such relief was necessary in this case to eliminate the anticompetitive effects of the acquisition of Labatt stock. Schlitz has already tried to prevent the introduction of Labatt beer into the United States (Fdg. 65, J.S. 16a–17a). If Schlitz were allowed to retain Labatt—a large and prosperous Canadian brewer—it would eliminate the substantial potential competition created by Labatt's planned expansion into the American market (Fdgs. 61–67, J.S. 16a–17a). Moreover, Labatt intended to expand General Brewing eastward to become a national brewer. A decree which separated General Brewing from Labatt might make it less likely that General Brewing

would enter eastern markets and it might deprive General Brewing of the financial, managerial and technical support necessary to accomplish this expansion (Fdgs. 63–64, J.S. 16a; J.S. 38a–39a).[15]

Appellants have no basis for implying that the relief ordered by the district court is inequitable. It should not be difficult to sell a block of securities in a profitable company (see Pre-Trial Hearing, May 12, 1965, pp. 8–9). Moreover, while Schlitz claims that it bought Labatt only in order to enter the Canadian market, it failed to convince the trial judge of this fact. He thought that Schlitz may well have sought control of Labatt with an eye towards obtaining control of General Brewing (J.S. 38a). In addition, it is probable effect on competition, not motive, that is critical in a Section 7 case. Finally, though Schlitz claims that the acquisition of Labatt is the only feasible way to enter the Canadian market, undisputed testimony introduced at trial revealed five different ways that Schlitz might enter this market (see Tr. of Trial, pp. 1993–1994; Plaintiff's Post-Trial Brief, pp. 88–90). In no sense, then, can the relief granted by the trial judge be viewed as an abuse of his discretion.[16]

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[15] While other brewers might acquire General Brewing and provide such support, the sale of General Brewing to one of the larger American brewers might well create new antitrust problems. Cf. *United States* v. *duPont & Co.*, *supra*, at 333; J.S. 39a.

[16] Two directors of General Brewing and a minority shareholder have filed an *amicus* brief asking this Court to note probable jurisdiction so that they may present their views about proper relief. In particular they wish to argue that Schlitz should be permitted to keep Labatt and to divest only General

2. Appellant points out that when Schlitz acquired Burgermeister the Department of Justice orally told counsel that the Department was not prepared to take any action *at that time* to block the acquisition, and that the Department took no action for two years. Appellants claim that, for this reason, the government may not now attack the acquisition unless "some justification or change in circumstances * * * appear[s] from the records" (J.S. 22).

The record, however, is replete with evidence of changed circumstances. The subsequent acquisition of Labatt showed that Schlitz was pursuing a plan

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Brewing because ownership by Labatt hurts General Brewing. The request of the *amici* should be denied. The issue that they raise was fully argued in the district court, with Schlitz forcefully maintaining the position that the *amici* take here. The trial judge reasonably concluded that the "evidence clearly demonstrates that Labatt had the desire, the intention and the resourcefulness to * * * make General Brewing a stronger competitor in * * * [American] markets" (J.S. 37a). Moreover, the trial judge ordered Schlitz to divest Labatt as well as General Brewing primarily because he believed—and the *amici* seem to agree (*amicus* brief p. 8)—that control of General Brewing made Labatt a stronger potential competitor in American markets (Fdgs. 61–66; J.S. 16a–17a), and, as this Court has held, economic hardship to minority shareholders may be considered only when a judge is choosing between alternative schemes of relief that are equally effective (*United States* v. *du Pont & Co.*, 366 U.S. 316, 327). Finally, the *amici* made no attempt to present their views to the district court, as they might easily have done. The fact that the court heard testimony from General Brewing, a party to the case, surely does not require it on its own initiative to seek the views of all minority shareholders or to appoint special counsel to represent them.

of growth through merger. Moreover, there were further increases in the concentration of the brewing industry (Fdgs. 43–48, J.S. 13a–14a; App. A, *infra*, pp. 23–27). Finally, additional evidence—revealing Schlitz's intent to introduce its own brand into California in the event it could not buy Burgermeister—was discovered in the form of a document not made available by Schlitz to the government in 1961 (PX 2).[17]

In any event, the government never promised not to proceed against this acquisition and is therefore not barred even if circumstances have not changed. Since the Department of Justice has no authority to suspend the antitrust laws or to immunize transactions by issuing advisory opinions (cf. *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409; *United States* v. *San Francisco*, 310 U.S. 16, 32), even formal business review letters state only the government's *present* intention not to bring an antitrust suit. Thus such a letter would not have prevented the government from later attacking the Burgermeister transaction. *United States* v. *Grinnell*, 236 F. Supp. 244 (D. R.I.), affirmed, 384 U.S. 563. The government gives an oral indication of its present enforcement intentions when it does not wish to give even the *appearance* of approving a transaction. Schlitz was well aware that the government's oral statement constituted no "clearance" of any sort (Fdgs. 83–86, J.S. 19a–20a). There thus is no basis

[17] In 1961 Schlitz had been asked to provide the Department with all information relevant to the Burgermeister acquisition.

whatever for estopping the government or requiring that it prove changed circumstances.[18]

3. Schlitz argues that certain procedural rulings by the trial court deprived it of a fair trial. An examination of the record, however, shows that the trial court's rulings were entirely correct.

a. The trial court's refusal to modify the temporary restraining order was a sound exercise of judicial discretion. The questions in issue in a modification hearing would have been identical to several of those that were to be presented at the trial, which was to be held in a few weeks' time.[19] There was no pressing need for immediate modification. The trial judge rightly postponed deciding these questions and Schlitz was in no way prejudiced by this decision.

b. The trial court's refusal to allow Schlitz additional time under local Rule 2 in order to depose certain witnesses was also proper. Schlitz had more than a year and a half to prepare for trial; six months

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[18] Nor is the fact that the government was aware of the Burgermeister transaction yet did not act for two years a basis for estoppel. A requirement that suits must be brought immediately or soon after the government first hears of a possible violation would impose an impossible burden upon antitrust enforcement. See *United States* v. *New Orleans Chapter, Associated General Contractors*, 382 U.S. 17; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150.

[19] The basic question involved would have been whether Schlitz should be allowed to sell General Brewing separately rather than required to dispose of all the illegally acquired Labatt shares. This issue is precisely what the trial judge had to decide when fashioning appropriate relief. It was obviously easier to decide the question after determining what effect Schlitz's acquisition of Labatt stock might have upon competition.

before trial it obtained a list from which the government's witnesses would be drawn six months before trial; and the trial date was postponed numerous times at Schlitz's request. Yet Schlitz made no effort to take depositions until just before trial was due to begin.[20] Under the district court's rules, Schlitz had forfeited its right to take additional depositions. It was only after the trial court had held a full hearing and carefully elicited what Schlitz hoped to discover by deposition that it determined that further postponement of the trial date to allow the depositions to be taken would be unjustified.[21]

c. The trial court held an extensive hearing on Schlitz's motion to reopen the trial to take evidence about General Brewing's sale of one of its plants. After carefully examining affidavits and memoranda concerning the transaction, and fully eliciting from Schlitz what it hoped to prove, the court concluded that it was highly unlikely that Schlitz would be able to produce evidence with any significant bearing upon any issue in the case, that further delay might prejudice the business interests of Labatt and General Brewing (Post-Trial Hearing, March 10, 1966, p. 8), and that reopening the trial, therefore, could not be justified. The record of the hearing makes clear, we submit, that the trial court's ruling was justified.

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[20] Inaction during extended time for depositions and lateness of application for depositions were held sufficient reasons to refuse to permit deposition in *Tennessee Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 145.

[21] It also became apparent at the hearing that Schlitz, in a companion private antitrust suit, had already taken the depositions of two of the five witnesses that it was asking to depose.

d. Schlitz suggests that the trial court's Findings of Fact and Conclusions of Law are defective. The trial judge asked each side to prepare findings to be submitted with post-trial briefs explaining why they should be adopted. Only after careful sifting did he adopt findings which "incorporate[d] many substantial additions, deletions and revisions as well as numerous other changes" (J.S. 3a). And he carefully explained why the findings of the losing party were rejected. This case is thus unlike *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, in which this Court commented disparagingly upon the district court's action in first reaching a decision and then requesting the prevailing party to draw up findings which it mechanically adopted. Even in *El Paso*, moreover, the Court declined to deem the judge's conduct in this respect a ground for reversal.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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JONATHAN D. DUBOIS,
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SEPTEMBER 1966.

APPENDIX A

Brewers Who Have Been in the Top 25 at Some Time After 1939 and Head Office Location

1. Acme Brewing Co., San Francisco, Calif.
2. Anheuser-Busch, Inc., St. Louis, Mo.
3. Associated Brewing Co. (Pfeiffer), Detroit, Mich.
4. (P) Ballantine & Sons, Newark, N.J.
5. Burger Brewing Co., Cincinnati, Ohio
6. Blatz Brewing Co., Milwaukee, Wisc.
7. Burgermeister Brewing Corp. (San Francisco), San Francisco, Calif.
8. Carling Brewing Co. (Brewing Corp. of America), Cleveland, Ohio
9. (Adolph) Coors Co., Golden, Colo.
10. Drewrys Limited U.S.A., Inc., South Bend, Ind.
11. Duquesne Brewing Co., Pittsburgh, Pa.
12. Falstaff Brewing Co., St. Louis, Mo.
13. Feigenspan Brewing Co., Newark, N.J.
14. Fort Pitt Brewing Co., Sharpsburg, Pa.
15. General Brewing Corp. (Lucky Lager), San Francisco, Calif.
16. Genesee Brewing Co., Rochester, N.Y.
17. Goebel Brewing Co., Detroit, Mich.
18. Griesedieck Bros., St. Louis, Mo.
19. Griesedieck-Western Brewing Co., Belleville, Ill.
20. Gunther Brewing Co., Baltimore, Md.
21. Theo. Hamm Brewing Co., St. Paul, Minn.
22. Hudepohl Brewing Co., Cincinnati, Ohio.
23. International Breweries, Inc., Detroit, Mich.
24. Jackson Brewing Co., New Orleans, La.
25. John F. Trommer, Inc., Brooklyn, N.Y.

26. (G.) Krueger Brewing Co., Newark, N.J.
27. Liebmann Breweries, Inc., Brooklyn, N.Y.
28. Lone Star Brewing Co., San Antonio, Texas
29. Los Angeles Brewing Co., Los Angeles, Calif.
30. Miller Brewing Co., Milwaukee, Wisc.
31. Minneapolis Brewing Co., Minneapolis, Minn.
32. Narragansett Brewing Co., Cranston, R.I.
33. National Brewing Co., Baltimore, Md.
34. Olympia Brewing Company, Olympia, Wash.
35. Pabst Brewing Company, Milwaukee, Wisc.
36. Pearl Brewing Co., San Antonio, Texas
37. Peter Fox Brewing Co., Chicago, Ill.
38. Piel Bros., Brooklyn, N.Y.
39. Pittsburgh Brewing Co., Pittsburgh, Pa.
40. Red Top Brewing Co., Cincinnati, Ohio
41. Jacob Ruppert, New York, N.Y.
42. (The F. & M.) Schaefer Brewing Co., Brooklyn, N.Y.
43. (Jos.) Schlitz Brewing Co., Milwaukee, Wisc.
44. (C.) Schmidt & Sons, Inc., Philadelphia, Pa.
45. (Jacob) Schmidt Brewing Co., St. Paul, Minn.
46. Stegmaier Brewing Co., Wilkes-Barre, Pa.
47. Stroh Brewing Co., Detroit, Mich.
48. Terre Haute Brewing Co., Terre Haute, Ind.

Leading brewers showing rank (R) and volume in thousands of barrels (vol.) (last "000" omitted)

Brewer	1939		1940		1941		1942		1943	
	R.	Vol.	R.	Vol.	R.	Vol.	R.	Vol.	R.	Vol.
Acme	19	500	16	533	12	659	10	848	9	1,008
Anheuser-Busch	1	2,306	1	2,468	1	3,090	1	3,492	1	3,565
Associated (Pfeiffer)									29	517
Ballentine	6	1,289	5	1,322	5	1,626	4	1,887	3	2,630
Burger			36	323	34	375	29	460	20	680
Blatz	10	679	13	568	18	578	13	701	11	920
Buggermeister									37	235
Carling (Br. Co. of Am.)	22	403	29	354	21	457	19	615	15	780
Coors										
Drewrys									33	330
Duquesne	9	680	9	690	8	950	9	975	10	980
Falstaff	13	622	10	685	7	1,029	7	1,229	7	1,226
Feigenspan	11	659	14	566	16	597	15	660	25	611
Fort Pitt	32	225	40	295	29	415	22	553		
General (Lucky Lager)									27	540
Genesee									34	315
Goebel									28	541
Griesedieck Bros									31	431
Griesedieck-Western									36	280
Hamm's	8	780	8	694	9	800	11	710	12	800
Hudepohl	24	385	28	365	19	499	21	560	18	690
Jackson									30	475
John Trommer	14	574	15	556	17	592	20	576	24	617
Krueger	23	386	22	415	20	493	23	552	22	631
Liebmann	12	633	11	670	10	789	8	979	8	1,160
Los Angeles										
Miller	17	543	18	522	15	617	12	707	16	720
Minneapolis										
National									35	300
Olympia										
Pabst	3	1,650	2	1,730	2	2,080	3	2,500	4	2,629
Peter Fox							25	541	13	741
Piel									32	416
Pittsburgh	20	484	19	520	21	450	16	650	17	700
Red Top	31	325	26	375	21	450	16	650	19	660
Ruppert	4	1,325	6	1,228	6	1,345	6	1,426	6	1,615
Schaefer	5	1,305	4	1,390	4	1,678	5	1,707	5	1,801
Schlitz	2	1,651	3	1,570	3	1,993	2	2,730	2	3,173
C. Schmidt	15	573	12	568	13	646	14	694	14	735
J. Schmidt	7	810	7	721	11	720	17	625	21	633
Stegmaier	21	433	21	433	21	450	24	510	23	625
Stroh	18	536	20	497	14	620	18	621	26	552
Terre Haute										

Leading brewers showing rank (R) and volume in thousands of barrels (vol.) (last "000" omitted)

Brewer	1944		1945		1946		1947		1948	
	R.	Vol.	R.	Vol.	R.	Vol.	R.	Vol.	R.	Vol.
Acme	7	1,310	7	1,360	8	1,300	11	1,159	20	863
Anheuser-Busch	1	3,814	1	3,760	2	3,156	4	3,609	4	4,050
Associated (Pfeiffer)	24	537	25	545	25	512	21	780	14	1,094
Ballantine	3	2,793	4	2,810	3	2,662	3	3,726	2	4,138
Burger										
Blatz	10	1,062	10	1,093	9	1,210	9	1,491	9	1,389
Burgermeister	34	264	35	269	36	243	37	363		462
Carling (Br. Co. of Am.)	12	950	11	1,043	17	715	26	650	33	464
Coors			34	316	35	284	36	395	32	470
Drewrys	33	312	33	335	34	331	31	533	31	494
Duquesne	11	1,016	12	1,034	11	979	10	1,167	12	1,110
Falstaff	9	1,255	8	1,338	10	1,149	8	1,651	5	2,304
Fiegenspan										
Fort Pitt	16	747	18	714	16	740	16	979	10	1,202
General (Lucky Lager)	22	568	22	599	23	559	25	658	25	694
Genesee	31	330	32	350	29	435	30	540	28	622
Goebel	21	897	21	939	20	635	18	894	16	1,022
Griesedieck Bros	28	426	28	461	30	413	26	618	30	534
Griesedieck-Western	32	325	32	350	32	377	28	610	15	1,057
Hamm's	13	800	15	799	12	805	13	1,000	11	1,200
Hudepohl	20	(1)	(1)	(1)			32	500	29	573
Jackson	29	425	29	453	31	390	33	479	34	460
John Trommer	17	700	14	820	15	765	12	1,020	18	990
Krueger	19	680	13	850	14	791	15	980	22	835
Liebmann	8	1,275	9	1,325	7	1,300	6	2,100	7	2,110
Los Angeles	23	541	24	553	26	496	27	615	24	751
Miller	15	741	17	729	19	644	20	806	19	911
Minneapolis	25	535	23	590	22	580	23	705	26	693
National	30	344	31	355	34	331	38	300	36	430
Olympia					33	341	35	409	37	365
Pabst	4	2,200	3	2,833	1	3,320	2	3,732	3	4,114
Peter Fox	(2)	(2)	1	304	33	358	34	416	35	436
Piel	27	479	27	522	28	468	29	560	27	650
Pittsburgh					18	650	24	692		
Red Top	18	690	19	710	13	800	14	985	21	855
Ruppert	6	1,785	6	1,885	6	1,785	7	1,902	8	1,638
Schaefer	5	1,931	5	2,250	5	2,150	5	2,400	6	2,250
Schlitz	2	3,246	2	3,062	4	2,649	1	3,991	1	4,280
C. Schmidt	14	791	16	797	20	588	17	971	13	1,099
J. Schmidt										
Stegmaier										
Stroh	20	632	20	649	24	543	19	877	23	822
Terre Haute	26	493	26	524	27	472	22	743	17	1,008

[1] Lunther.
[2] Pearls

Leading brewers showing rank (R.) and volume in thousands of barrels (vol.) (last "000" omitted)

Brewer	1949		1950		1951		1952		1953	
	R.	Vol.	R.	Vol.	R.	Vol.	R.	Vol.	R.	Vol.
Anheuser-Busch	2	4,826	2	4,889	2	5,479	2	6,094	1	6,711
Associated (Pfeiffer)	9	1,438	10	1,618	10	1,555	11	1,804	14	1,442
Ballantine	3	4,514	3	4,375	3	3,990	4	4,088	4	3,882
Blatz	8	1,598	9	1,746	9	1,799	10	1,662	20	*1,082
Burgermeister	36	496	29	623	19	838	19	961	21	1,018
Carling	39	362	36	502	29	689	20	893	19	1,096
Coors	30	605	28	667	31	680	26	757	26	812
Drewrys	31	600	25	730	23	772	16	1,222	15	1,420
Duquesne	13	1,176	15	1,081	17	1,094	30	*631	23	923
Falstaff	5	2,474	7	2,287	8	2,295	8	2,277	6	2,911
Fort Pitt	12	1,177	19	963	22	805				
General (Lucky)	21	857	14	1,096	14	1,242	12	1,475	10	1,740
Genesee	26	710	27	677	26	730	23	790	25	815
Goebel	16	1,142	12	1,258	13	1,408	13	1,445	12	1,580
Griesedieck Bros.	27	694	20	810	20	817	21	825		
Griesedieck-Western	10	1,436	11	1,442	12	1,418	14	1,424	13	1,484
Gunther	28	671	31	601	25	745				
Hamm's	18	1,033	17	1,053	15	1,150	15	1,337	11	1,686
International										
Jackson	33	586	26	703	28	697	25	767	22	934
John Trommer	19	988								
Krueger	20	866	24	750						
Liebmann	7	1,875	5	2,662	5	2,800	6	2,856	5	3,085
Lone Star					34	449	31	501	30	577
Los Angeles (Pabst)	22	794								
Miller	11	1,330	8	2,105	6	2,612	5	3,043	8	*2,138
Minneapolis	25	724								
Narragansett	29	610	30	609			28	681	27	804
National	34	519	33	551	27	705	24	775	24	840
Olympia	37	475	32	595	30	665	27	725	29	764
Pabst	4	4,048	4	3,419	4	3,950	3	4,047	3	*4,250
Pearl	38	394	34	530	33	607	29	678	28	770
Piel Bros.	35	510	23	767	18	1,090	18	1,200	16	1,375
Pittsburgh	24	736	21	800	21	812				
Red Top	23	785	22	769	24	765				
Jacob Ruppert	17	1,079	13	1,253	11	1,517	9	1,800	9	2,005
Schaefer	6	1,927	6	2,652	7	2,600	7	2,485	7	2,641
Schlitz	1	4,679	1	5,097	1	5,716	1	6,347	2	*5,255
C. Schmidt	15	1,148	16	1,068	16	1,116	17	1,213	17	1,374
Stroh	32	596	35	514	32	636	22	822	18	1,135
Terre Haute	14	1,150	18	971						

*Strike.

Leading brewers showing rank (R) and volume in thousands of barrels (vol.) (last "000" omitted)

Brewer	1954		1955		1956		1957		1958	
	R.	Vol.	R.	Vol.	R.	Vol.	R.	Vol.	R.	Vol.
Anheuser-Busch	1	5,820	2	5,617	2	5,864	1	6,116	1	*6,982
Associated (Pfeiffer)	18	1,060	18	1,208	22	1,031	25	911	26	845
Ballantine	3	3,713	3	3,953	3	3,967	4	3,982	5	4,036
Blatz	21	975	24	928	24	949	18	1,247	13	1,700
Burgermeister	19	1,036	20	1,070	21	1,033	23	974	24	972
Carling	17	1,340	9	2,655	7	2,997	6	3,151	6	3,531
Coors	22	922	21	1,045	18	1,090	19	1,147	17	1,410
Drewrys	15	1,372	15	1,425	15	1,432	16	1,369	15	1,527
Duquesne	23	904	23	988	20	1,046	22	1,062	21	1,032
Falstaff	6	3,290	4	3,653	4	3,870	3	4,292	3	*4,502
Fort Pitt										
General (Lucky)	10	1,775	13	1,324	12	1,960	12	2,024	10	*2,265
Genesee	28	810	28	788	27	800	27	804	29	798
Goebel	16	1,346	19	1,116						
Griesedieck Bros										
Griesedieck-Western										
Gunther										
Hamm's	8	2,249	7	3,072	5	3,325	5	3,376	7	*3,304
International									27	826
Jackson	20	1,006	22	1,008	19	1,051	20	1,107	22	1,030
John Trommer										
Krueger										
Liebmann	5	3,410	6	3,162	8	2,882	7	2,966	9	*2,847
Lone Star	29	667	29	725	28	749	28	739	28	785
Los Angeles (Pabst)										
Miller	9	2,096	10	2,191	11	2,246	11	2,221	11	2,210
Minneapolis										
Narragansett	25	838	25	897	26	851	26	906	25	888
National	24	845	17	1,286	17	1,115	17	1,301	19	*1,294
Olympia	27	815	26	865	23	1,016	21	1,104	20	1,249
Pabst	4	3,500	5	3,278	6	3,115	9	2,700	4	*4,250
Pearl	26	836	27	863	25	905	24	943	23	981
Pfeil Bros	14	1,395	16	1,365	16	1,350	15	1,435	16	*1,420
Pittsburgh										
Red Top										
Jacob Ruppert	11	1,769	14	1,638	14	1,539	14	1,490	18	*1,406
Schaefer	7	2,690	8	2,655	9	2,720	8	2,940	8	*2,887
Schlitz	2	5,406	1	5,780	1	5,941	2	6,024	2	*5,893
C. Schmidt	12	1,516	12	1,917	13	1,850	13	1,757	14	1,661
Stroh	13	1,450	11	2,153	10	2,709	10	2,584	12	1,925
Terre Haute										

*Strike.

Leading brewers showing rank (R) and volume in thousands of barrels (vol.) (last "000" omitted)

Brewer	1959		1960		1961		1962		1963	
	R.	Vol.	R.	Vol.	R.	Vol.	R.	Vol.	R.	Vol.
Anheuser-Busch	1	8,065	1	8,477	1	8,508	1	9,035	1	9,397
Associated	26	900	24	918	24	932	24	948	21	1,151
Ballantine	6	4,325	6	4,409	6	4,510	6	4,538	6	4,478
Burgermeister	21	974	----	[1] 893	----	----	----	----	----	----
Carling	5	4,418	4	4,822	5	5,047	4	5,359	4	5,681
Coors	14	1,649	13	1,907	11	2,303	11	2,773	9	3,054
Drewrys	15	1,629	15	1,612	15	1,651	14	1,948	12	2,602
Duquesne	20	1,008	20	1,046	22	1,007	22	1,003	24	1,010
Falstaff	3	4,748	3	4,911	4	5,128	5	5,310	5	5,548
General	11	2,178	11	2,168	12	2,237	12	2,160	14	1,982
Genesee	27	789	27	805	26	880	23	965	22	1,100
Hamm's	7	3,552	7	3,907	7	3,714	8	3,726	7	3,826
International	24	932	23	919	----	----	----	----	----	----
Jackson	23	961	22	950	23	964	21	1,032	23	1,018
Liebmann	9	2,929	9	2,950	9	2,987	9	2,992	10	3,018
Lone Star	26	802	25	895	25	903	25	895	25	900
Miller	10	2,359	10	2,377	10	2,707	10	2,805	11	2,830
Narragansett	25	905	26	894	21	1,094	20	1,161	20	1,226
National	19	1,342	18	1,355	18	1,375	18	1,381	18	1,401
Olympia	18	1,415	16	1,497	16	1,558	16	1,742	16	1,776
Pabst	4	4,500	5	4,738	3	5,217	3	5,844	3	6,672
Pearl	22	968	21	1,023	17	1,429	17	1,484	17	1,599
Piel	16	1,511	17	1,481	19	1,360	----	----	----	----
Jacob Ruppert	17	1,430	19	1,305	20	1,200	19	1,209	19	1,269
Schaefer	8	3,050	8	3,203	8	3,467	7	3,778	8	3,750
Schlitz	2	5,863	2	5,694	2	5,767	2	6,862	2	7,833
C. Schmidt	13	1,732	14	1,802	14	1,855	15	1,871	15	1,941
Stroh	12	2,111	12	2,075	13	2,029	13	2,037	13	2,045

[1] Annual Rept. 1960, pp. 4, 8.

Sales of 25 top brewers

Year	Thousands of barrels	Percent of national market	Year	Thousands of barrels	Percent of national market
1939			1952		60.2
1940			1953		61.3
1941		41.5	1954		62.1
1942		42.2	1955		64.9
1943		41.4	1956		67.5
1944		39.7	1957	58,418	69.25
1945		41.1	1958	59,537	70.52
1946		40.3	1959	64,610	73.8
1947		46.0	1960	[1] 66,441–67,873	75.61
1948		49.25	1961	[1] 68,949–69,081	77.4
1949		51.5	1962	72,881	79.9
1950		55.2	1963	[1] 77,107–93,894	82.2
1951		57.7			

[1] 100 percent.

APPENDIX B

Beer sales in various States (in barrels)

	California [1]			Idaho [2]			Montana [3]		
	1961	1962	1963	1961	1962	1963	1961	1962	1963
Anheuser-Busch, Inc.	526,241	577,282	1,033,218	8,993	9,667	9,279	33,975	33,209	31,855
Arizona Brewing Co.	28,687	29,042	29,185						
Blitz-Weinhard Co.	1,323	1,597	1,343	2,973	1,980	8,638			725
Burgermeister Brewing [4]	653,898			306			501		
Carling Brewing Co.	19,471	21,601	24,840	19,603	19,952	19,618	1,149	7,726	1,239
Adolph Coors Co.	717,511	982,924	1,193,795	44,674	47,516	56,698			
Falstaff Brewing Corp.	385,893	389,650	350,835						
General Brewing Corp.	1,416,973	1,333,185	1,169,151	69,188	67,959	64,391	52,814	57,225	54,823
Grace Bros. Brewing Co.	140,808	137,433	131,146						
Great Falls Brewing Co.				1,124	1,363	1,118	129,253	122,471	116,741
Hamm Brewing Co., Theo.	943,827	1,012,495	992,580	4,421	9,692	11,743	20,493	19,449	50,576
Maier Brewing Co.	457,525	463,825	556,983						
Miller Brewing Co.	231,067	234,855	227,821	2,321	3,063	2,709	5,805	6,093	9,645
Olympia Brewing Co.	771,658	847,570	837,440	77,672	83,047	86,132	16,213	31,126	44,608
Pabst Brewing Co.	642,218	648,863	661,670	3,227	3,011	1,533	1,883	1,316	791
Regal Pale Brewing Co. [5]	219,834	190,590							
Schlitz Brewing Co., Jos.	283,278	996,963	1,120,462	1,768	1,721	1,809	23,756	26,072	28,000
Sicks' Rainier Brewing	62,677	67,350	67,301	18,922	17,667	17,997	50,115	54,103	54,000
All Other Companies [6]	203,696	198,769	212,512	24,485	21,424	12,766	103,817	100,259	74,304
Total	7,716,565	8,134,104	8,620,302	279,768	288,062	294,431	439,774	459,049	467,967

	Nevada [1]			Oregon [1]			Utah [1]		
	1961	1962	1963	1961	1962	1963	1961	1962	1963
Anheuser-Busch	22,881	27,401	30,557	19,197	21,994	23,349	5,022	5,134	5,724
Arizona	3,677	3,068	3,033				6,390	5,050	4,433
Blitz				180,377	196,384	225,744			802
Burgermeister [6]				12,040					
Carling	508	435	890	150,403	137,329	135,849			
Coors	74,636	104,202	117,716				80,715	95,364	102,238
Falstaff	9,817	9,421	8,824						
General	41,382	41,170	39,847	93,104	91,975	87,838	94,692	94,647	100,708
Grace	1,173	1,625	1,927	213	422	291			
Hamm	28,122	32,661	39,863	35,787	37,036	42,259			
Maier	294	809	3,609	4,323	3,980	3,808			
Miller	8,861	10,087	10,496	13,236	15,603	16,108	4,649	4,856	4,238
Olympia	10,111	21,690	23,084	225,146	241,145	239,503	4,891	13,745	18,493
Pabst	472	256	123	2,685	2,840	2,297	4,244	4,055	2,497
Schlitz	19,232	28,552	33,657	41,520	20,492	28,728	6,005	5,322	7,777
Sicks'	115			94,598	45,378	50,932			
All other [6]				35,629	40,346	24,489	31,687	30,514	25,063
Total	230,281	281,377	313,716	821,248	854,933	891,194	239,324	258,697	271,973

See footnotes at end of table.

	Washington [1]			Arizona [1]			Wyoming		
	1961	1962	1963	1961	1962	1963	1961	1962	1963
Anheuser-Busch	27,331	32,834	32,650	67,358	81,771	88,534	20,442	21,488	21,633
Arizona				100,219	90,486	94,451			
Blitz	31,185	31,594	49,282						
Burgermeister	3,414								
Carling	178,663	156,771	449,137	1,050	2,589	7,317	1,559	2,095	2,113
Coors				281,822	310,614	312,266	63,082	70,900	67,530
Falstaff				62,801	72,391	74,130	3,311	1,846	3,271
General	149,898	158,610	147,023	78,283	81,142	74,601	4,410	3,692	2,998
Grace	664	667	644	473	351	349			
Great Falls	32						2,238	2,004	1,718
Hamm	52,292	51,722	56,968			17,559	23,275	20,701	21,631
Maier	10,572	10,032	9,849	7,881	7,045	9,068			
Miller	22,653	26,386	24,539	12,364	13,278	13,837	4,277	4,204	4,351
Olympia	377,323	405,543	420,893	7,183	9,170	9,950		3,132	2,224
Pabst	15,305	13,570	17,278	6,833	14,261	18,216	3,406	3,113	2,704
Schlitz	7,365	13,441	13,726	45,156	71,444	72,278	12,596	11,880	14,784
Sicks'	394,748	396,910	401,795				687	527	597
All other	117,699	132,080	114,214				7,186	7,621	9,872
Total	1,389,164	1,430,180	1,437,998	671,423	754,542	792,658	146,449	153,203	155,426

[1] Data from California Brewers Association (based on California State tax data) except Blitz-Weinhard figure which was obtained directly from that company.
[2] Data from State taxing authority.
[3] Data obtained directly from firms listed.
[4] Sales combined with Jos. Schlitz Brewing Co. after 1961.
[5] Purchased by Maier Brewing Company in 1963.
[6] Each with less than 100,000 barrels sales in each year in the West. Actual amount of such sales for Nevada and Arizona is unknown, but comparison of total obtained from individual firm figures with published total beer sales for each of these States indicates it is very small.

Market shares of major breweries in 8-State,[1] 9-State,[2] and 11-State[3] areas, 1963[4]

Company	8-State		9-State		11-State	
	Barrels	%	Barrels	%	Barrels	%
Anheuser-Busch	1,255,266	9.6	1,308,694	9.7	1,370,239	9.7
Arizona Brewing	131,102	1.0	146,681	1.1	146,913	1.0
Blitz-Weinhard Co	296,534	2.3	296,534	2.2	296,534	2.1
Carling Brewing Co	338,890	2.6	338,890	2.5	347,331	2.5
Coors Co, Adolph	1,782,715	13.6	1,965,888	14.5	2,267,305	16.1
Falstaff Brewing Corp	433,789	3.3	473,355	3.5	496,533	3.5
General Brewing Corp	1,738,082	13.3	1,749,150	12.9	1,767,262	12.5
Grace Bros. Brewing Co	134,357	1.0	134,357	1.0	134,357	1.0
Great Falls Brewing Co	117,859	.9	117,859	.9	119,577	.9
Hamm Brewing Co., Theo	1,211,548	9.3	1,244,117	9.2	1,285,843	9.1
Maier Brewing Co	593,407	4.5	593,407	4.4	593,407	4.2
Miller Brewing Co	309,393	2.4	320,730	2.4	341,788	2.4
Olympia Brewing Co	1,680,103	12.8	1,680,103	12.4	1,682,327	11.9
Pabst Brewing Co	704,405	5.4	704,405	5.2	710,238	5.0
Schlitz Brewing Co., Jos	1,306,642	10.0	1,357,451	10.0	1,403,812	10.0
Sicks' Rainier Brewing Co	592,799	4.5	592,799	4.4	593,396	4.2
All other companies	452,348	3.5	494,073	3.7	549,184	3.9
Total	13,090,239	100.0	13,518,493	100.0	14,106,046	100.0

[1] States of California, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Arizona.
[2] Eight States as above, plus New Mexico.
[3] Nine States as above, plus Colorado and Wyoming.
[4] Data for Colorado are for July–December 1963.

Sources: For 8-State area, Stipulation as to Certain Facts and Certain Evidence, filed June 9, 1965. For Colorado, New Mexico and Wyoming, Defendants' Exhibit DS-185, pages 4, 14 and 26.

APPENDIX C

III

MATTERS OF STIPULATION

Subject to the reservation of objections above stated matters of fact and of evidence are stipulated to as follows:

13. *Sales of Beer in California.* Attached hereto are statistical tables showing sales of beer in California by brewers and by years. These were prepared from statistical reports prepared by the California Brewers Association; compiled from figures supplied by California state agencies and providing statistical information in respect of sales of beer in California. In recent years, this data has been obtained from the California State Board of Equalization, which in turn obtains a monthly tax return regarding sales of beer in California from each brewer located in California and each out-of-state brewer who supplies beer in California.

Before 1960 data of this sort for individual brewers was available only for brewers having breweries in California. Sales of beer produced elsewhere were reported but not by individual brands so that before 1960 only the total is available for beer produced outside of California and sold in California and is shown as "Imports" (whether produced elsewhere in the United States or abroad). Thus figures for such brewers as Anheuser-Busch, Schlitz and Falstaff are not separately shown until they had breweries in California. The figures for sales for each such brewer before it had a brewery in California are included in

"imports" and the failure of the name of such brewer to appear in earlier years does not mean it had no sales in California in such earlier years. Brewers who never have had a brewery in California, as Coors, Olympia and Miller appear separately for the first time in 1960 and their sales in California before 1960 are included in "Imports".

The following changes have occurred in the designation of brewers listed in these reports due to changes in corporate name and/or acquisition by another corporation, and brewery locations are:

Brewery Locations

Except as next noticed the brewers referred to in the statistical tables had a brewery in California:

The Adolph Coors brewery is located at Golden, Colorado.

The Olympic brewery is located at Olympia, Washington.

The Miller brewery is located at Milwaukee, Wisconsin.

The Sicks' Rainier brewery is located at Seattle, Washington.

Carling Brewing Co. has several breweries, none located in California.

The Arizona Brewing Co., Inc., brewery is at Phoenix, Arizona and it was recently acquired by Carling Brewing Co.

Change of Name

The name of San Francisco Brewing Corporation (at one time known as Milwaukee) was changed to Burgermeister Brewing Corporation on February 15, 1957.

The name of General Brewing Corporation was changed to Lucky Lager Brewing Company and then again changed back to General Brewing Corporation.

Aztec Brewing Co. changed its name to Altes Brewing Co.

Regal Amber Brewing Company changed its name to Regal Pale Brewing Company.

Pacific Brewing & Malting Co. (San Jose) on reorganization was known as Wieland's Brewing Co.

Acquisitions and Other Changes

The Golden West brewery (Oakland) was acquired by Goebel Brewing Co. (Detroit, Michigan) in 1950.

The Los Angeles Brewing Co. was acquired by Pabst Brewing Co. (Milwaukee, Wisconsin) in 1948 and merged with Pabst in 1953.

The Wieland brewery in San Jose (formerly Pacific) was acquired by Falstaff Brewing Corp. (St. Louis, Missouri) on February 15, 1952.

The Rainier brewery (San Francisco) was acquired by Theo. Hamm Brewing Co. (St. Paul, Minnesota) in 1953 and the name and brand was acquired by the Sicks' company of Seattle, Washington which became known as Sicks' Rainier Brewing Co.

Acme Breweries (for a short time known originally as California Brewing Association, not to be confused with a somewhat similar name that appeared for a short time later) had two breweries, one in Los Angeles and one in San Francisco. (a) The Los Angeles brewery was acquired by Rheingold Brewing Co. (Leibmann Breweries, Inc. of Brooklyn, New York) in 1953 and was acquired from Rheingold by Theo. Hamm Brewing Co., in 1957. The San Francisco Acme plant was also acquired in 1953 by Rheingold, was disposed of by it in 1954 to local interests who operated it as California Brewing Co. until August 1958 when it ceased operation as a brewery.

The assets, except cash, of Burgermeister Brewing Corp. were acquired by Jos. Schlitz Brewing Company as of December 31, 1961.

The Regal Pale brewery in San Francisco was acquired by Maier Brewing Co. in 1963.

	1933			1934		
	Calif. sales barrels	Rank	Percentage of share of market	Calif. sales barrels	Rank	Percentage of share of market
Acme	165,481	1	18.69	226,665	1	12.40
Rainier	158,943	2	17.95	214,010	2	11.71
Los Angeles Brew	135,166	3	15.27	157,981	4	8.65
Golden West	105,825	4	11.95	116,239	6	6.36
S.F. Brew	73,444	5	8.29	91,698	7	5.02
Aztec	44,718	6	5.05	176,742	3	9.67
Maier	41,586	7	4.70	74,517	9	4.08
Balboa	32,328	8	3.65	120,833	5	6.61
El Dorado	29,238	9	3.30	26,619	19	1.46
Fresno	16,777	10	1.89	31,288	16	1.71
Grace	15,420	11	1.74	41,721	13	2.28
Regal Amber	14,745	12	1.67	88,749	8	4.86
El Rey	13,836	13	1.56	19,894	23	1.09
Humboldt	11,963	14	1.35	71,627	10	3.92
Globe	9,723	15	1.10	39,067	14	2.14
Vernon	8,961	16	1.01	35,716	15	1.95
Ambassador	2,922	17	.33	26,171	20	1.43
Anchor	1,641	18	.19	3,370	27	.18
Pacific	818	19	.09	61,153	11	3.35
St. Claire	737	20	.08	29,698	18	1.63
?	493	21	.06	----	----	----
Capital	350	22	.04	----	----	----
Arrowhead	328	23	.04	----	----	----
General	----	----	----	47,579	12	2.60
Buffalo	----	----	----	32,494	17	1.78
Eckert	----	----	----	20,246	21	1.11
?	----	----	----	20,011	22	1.10
West Coast	----	----	----	14,426	24	.79
Salinas	----	----	----	12,811	25	.70
Monterey	----	----	----	8,465	26	.46
Yosemite	----	----	----	7,671	27	.42
North Star	----	----	----	2,565	29	.14
Bailey	----	----	----	2,489	30	.14
Modesto	----	----	----	1,934	31	.11
?	----	----	----	1,629	32	.09
Lynwood	----	----	----	744	33	.04
				107	34	.01
	885,443	----	----	1,826,929	----	----

No export sales figures for 1933 and 1934.

	1935			1936		
	Calif. sales barrels	Rank	Percentage of share of market	Calif. sales barrels	Rank	Percentage of share of market
Acme	242,627	1	13.15	357,557	1	15.69
Rainier	219,321	2	11.89	249,840	2	10.97
Los Angeles Brew	150,805	3	8.17	189,786	4	8.33
General	134,707	4	7.30	226,150	3	9.93
Aztec	131,598	5	7.13	130,798	6	5.74
Golden West	103,316	6	5.60	113,502	7	4.98
S. F. Brewing	97,895	7	5.31	131,741	5	5.78
Regal Amber	87,213	8	4.73	99,537	9	4.37
Humboldt	83,788	9	4.54	89,508	10	3.93
Balboa	67,691	10	3.67	37,692	16	1.65
Maier	63,793	11	3.46	78,298	11	3.44
Grace	62,045	12	3.36	105,886	8	4.65
Buffalo	50,770	13	2.75	65,754	12	2.89
Pacific	47,498	14	2.57	51,876	13	2.28
Vernon	35,551	15	1.93	40,874	15	1.79
El Dorado	33,489	16	1.81	45,345	14	1.99
St. Claire	31,545	17	1.71	35,686	18	1.57
Ambassador	31,339	18	1.70	36,855	17	1.62
Eckert	22,466	19	1.22	22,747	20	1.00
Globe	22,289	20	1.21	17,363	24	.76
Fresno	21,034	21	1.14	19,386	21	.85
Monterey	17,573	22	.95	13,429	25	.59
El Rey	13,081	23	.71	29,342	19	1.29
Salinas	12,094	24	.66	17,366	23	.76
Imperial	11,405	25	.62	6,877	29	.30
West Coast	9,669	26	.52	19,356	22	.85
Lynwood	9,011	27	.49	9,401	28	.41
Hollywood	8,079	28	.44	252	34	.01
Modesto	7,490	29	.41	9,830	27	.43
Yosemite	6,688	30	.36	6,133	30	.27
North Star	3,394	31	.18	90	35	.004
Anchor	2,492	32	.14	3,847	32	.17
Bailey	2,070	33	.11	----	----	----
Rio	886	34	.05	4,284	31	.19
W. L. & Gutsch	372	35	.02	1,437	33	.06
San Diego	----	----	----	10,553	26	.46
	1,845,084	----	----	2,278,378	----	----

	1937			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Acme	437,875	381,560	1	16.11
Ranier	319,406	286,685	2	12.10
General	268,264	248,392	3	10.49
Los Angeles Brew	236,569	232,508	4	9.82
Golden West	133,044	129,394	5	5.46
S. F. Brew	129,643	120,609	6	5.09
Aztec	119,213	107,346	7	4.53
Pacific Malt	104,244	95,529	8	4.03
Regal Amber	101,046	95,171	9	4.02
Grace	99,131	93,290	10	3.94
Maier	88,807	88,262	11	3.73
Buffalo	72,749	70,616	12	2.98
Humboldt	78,383	65,490	13	2.77
Balboa	49,364	46,478	14	1.96
El Dorado	45,283	45,232	15	1.91
Vernon	45,092	45,174	16	1.91
Eckert	34,279	33,657	17	1.42
St. Claire	30,878	30,515	18	1.29
Ambassador	27,408	27,355	19	1.16
El Rey	27,388	25,534	20	1.08
San Diego	17,780	17,773	21	.75
Fresno	16,750	16,750	22	.71
Globe	17,001	16,583	23	.70
Salinas	12,467	12,454	24	.53
Modesto	10,209	10,220	25	.43
Imperial	9,423	9,423	26	.40
West Coast	8,057	8,052	27	.34
Anchor	3,021	3,014	28	.13
Lynwood	1,787	1,784	29	.06
Gufsch	1,198	1,198	30	.05
Standard	1,195	1,195	31	.05
Monterey (Los Angeles)	915	902	32	.04
Rio	477	477	33	.02
	2,549,006	2,368,562		

	1938			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Acme	440,636	377,355	1	15.58
Ranier	296,270	267,683	2	11.05
Los Angeles Brew	259,926	257,043	3	10.61
Imports		230,781	4	9.53
General	253,022	225,800	5	9.32
Golden West	124,189	120,513	6	4.98
Pacific	115,176	108,176	7	4.47
Grace	102,621	100,708	8	4.16
Regal Amber	99,301	94,220	9	3.89
Aztec	101,165	90,176	10	3.72
S. F. Brewing	88,870	82,652	11	3.41
Maier	76,239	75,809	12	3.13
Monarch (Balboa)	71,301	69,340	13	2.86
Buffalo	59,428	58,351	14	2.41
Vernon	36,142	35,530	15	1.47
El Dorado	35,109	35,109	16	1.45
Humboldt	42,297	31,747	17	1.31
Eckert	30,712	30,324	18	1.25
Ambassador	23,498	23,496	19	.97
St. Claire	23,890	23,455	20	.97
Albion (El Rey)	19,440	18,883	21	.78
San Diego	18,568	18,420	22	.76
Fresno	13,929	13,929	23	.58
Monterey (Salinas)	12,703	12,693	24	.52
Globe	5,507	5,412	25	.22
Red Bluff	4,716	4,716	26	.19
Modesto	3,889	3,889	27	.16
Anchor	2,487	2,487	28	.10
Rollinson (West Coast)	1,587	1,534	29	.06
Kern	1,155	1,155	30	.05
Lynwood	277	277	31	.01
Imperial	212	212	32	.01
Yosemite	122	122	33	.005
	2,367,384	2,421,997		

	1939		
	California sales barrels	Rank	Percentage of share of market
Acme	428,177	1	17.21
Rainier	302,784	2	12.17
Los Angeles Brew	280,246	3	11.26
Imports	235,690	4	9.47
General	209,565	5	8.42
Regal Amber	129,809	6	5.22
Golden West	109,617	7	4.41
Grace	103,002	8	4.14
Pacific	102,882	9	4.14
S. F. Brewing	94,745	10	3.81
Aztec	87,512	11	3.52
Maier	82,018	12	3.30
Monarch	66,510	13	2.67
Buffalo	47,125	14	1.89
Eckert	32,522	15	1.31
Vernon	30,039	16	1.21
El Dorado	28,083	17	1.13
Albion	18,221	18	.73
Fresno	16,456	19	.66
Ambassador	15,820	20	.64
Humboldt	14,747	21	.59
San Diego	14,149	22	.57
St. Claire	12,711	23	.51
Monterey	10,410	24	.42
Red Bluff	4,938	25	.20
Kern	4,815	26	.19
Anchor	2,631	27	.11
Yosemite	2,355	28	.09
Globe	116	29	.005
Rollison	115	30	.005
Total	2,487,810		

No export sales figures for 1939.

	1940			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Acme	532,226	452,952	1	18.41
Rainier	363,290	309,655	2	12.59
Los Angeles Brew	302,787	299,836	3	12.19
Imports		244,067	4	9.92
General	218,295	211,200	5	8.58
Regal Amber	149,536	143,791	6	5.84
S. F. Brewing	143,323	119,309	7	4.84
Pacific	100,845	97,602	8	3.97
Grace	97,940	95,236	9	3.87
Aztec	104,765	91,900	10	3.74
Golden West	89,973	84,471	11	3.43
Maier	67,679	67,230	12	2.73
Monarch	65,138	64,557	13	2.62
Buffalo	35,002	34,592	14	1.41
Eckert	32,075	32,075	15	1.30
Vernon	28,282	27,303	16	1.11
El Dorado	24,714	24,714	17	1.00
Fresno	17,290	17,290	18	.70
Eagle (Albion)	14,749	14,503	19	.59
Monterey	11,498	11,498	20	.47
San Diego	11,275	11,275	21	.46
Anchor	2,160	2,160	22	.09
Ambassador	1,811	1,805	23	.07
Red Bluff	873	873	24	.04
Kern	300	300	25	.01
Yosemite	231	231	26	.009
Humboldt	65	32	27	.00
	2,416,122	2,460,457		

	1941			1942		
	Calif. sales barrels	Rank	Percentage of share of market	Calif. sales barrels	Rank	Percentage of share of market
Acme	537, 951	1	20. 05	719, 684	1	20. 89
Rainier	339, 328	2	12. 65	400, 631	5	11. 63
Los Angeles Brew	323, 886	3	12. 07	414, 680	3	12. 04
Imports	296, 497	4	11. 05	510, 900	2	14. 83
General	276, 956	5	10. 32	414, 617	4	12. 03
Regal Amber	170, 065	6	6. 34	220, 532	6	6. 40
S. F. Brew	120, 346	7	4. 49	142, 890	8	4. 15
Aztec	114, 311	8	4. 26	156, 629	7	4. 55
Pacific	106, 047	9	3. 95	125, 200	10	3. 63
Grace	81, 885	10	3. 05	129, 122	9	3. 75
Golden West	73, 571	11	2. 74	72, 105	11	2. 09
Maier	50, 600	12	1. 89	32, 089	13	. 93
Monarch	44, 576	13	1. 66	220	23	. 007
Buffalo	29, 350	14	1. 09	8, 085	16	. 23
Eckert	27, 498	15	1. 02	35, 632	12	1. 03
Vernon	23, 820	16	. 89	16, 153	15	. 47
El Dorado	20, 104	17	. 75	26, 141	14	. 76
Fresno	14, 095	18	. 53	8, 078	17	. 23
Monterey	10, 745	19	. 40	3, 052	19	. 09
Eagle (Albion)	10, 012	20	. 37	676	22	. 02
San Diego	9, 593	21	. 36	5, 361	18	. 16
Anchor	1, 635	22	. 06	1, 418	21	. 04
U. S. Brewing				1, 603	20	. 05
	2, 682, 871			3, 445, 498		

No export sales figures for 1941 and 1942.

	1943			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Acme	1, 008, 889	861, 749	1	21. 10
Imports		552, 802	2	13. 54
Los Angeles Brew	500, 065	492, 036	3	12. 05
Rainier	586, 654	487, 990	4	11. 95
General	548, 621	470, 536	5	11. 52
Regal Amber	308, 510	254, 992	6	6. 24
S. F. Brewing	235, 040	214, 042	7	5. 24
Aztec	200, 947	167, 101	8	4. 09
Grace	164, 563	156, 917	9	3. 84
Pacific	153, 720	137, 650	10	3. 37
Golden West	112, 856	101, 709	11	2. 49
Maier	57, 986	57, 460	12	1. 41
McKee (Eckert)	46, 305	46, 305	13	1. 13
Fresno	37, 073	35, 958	14	. 88
El Dorado	30, 795	30, 795	15	. 75
U.S. Brewing	15, 895	14, 091	16	. 35
Anchor	1, 479	1, 387	17	. 03
	4, 008, 898	4, 083, 520		

	1944			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Acme	1,309,853	1,115,722	1	23.79
Imports		585,524	2	12.49
Rainier	637,654	535,539	3	11.42
Los Angeles Brew	540,809	531,805	4	11.34
General	567,684	497,166	5	10.66
Regal Amber	320,871	287,504	6	6.13
S.F. Brewing	264,438	243,810	7	5.20
Aztec	212,564	197,324	8	4.21
Grace	193,742	192,292	9	4.10
Pacific	160,039	148,290	10	3.12
Golden West	112,170	104,067	11	2.22
Maier	68,366	67,536	12	1.44
Fresno	57,642	57,642	13	1.23
McKee	57,614	55,961	14	1.19
U.S. Brewing	42,291	36,159	15	.77
El Dorado	32,349	32,349	16	.69
Anchor	73,509	2,463	17	.05
	4,681,895	4,689,153		

	1945			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Acme	1,360,222	1,152,582	1	22.21
Imports		827,307	2	15.94
Rainier	652,989	568,538	3	10.96
General	599,421	564,800	4	10.88
Los Angeles Brew	552,846	545,604	5	10.51
Regal Amber	313,011	304,621	6	5.87
S. F. Brew	268,654	260,104	7	5.01
Aztec	248,333	224,414	8	4.32
Grace	166,722	166,722	9	3.21
Pacific	153,112	151,789	10	2.92
Golden West	147,193	147,193	11	2.84
Maier	90,822	90,479	12	1.74
McKee	59,008	56,811	13	1.09
Fresno (Grace)	52,525	52,525	14	1.01
El Dorado	32,935	32,935	15	.63
U.S. Brewing	37,223	30,390	16	.59
Buffalo	10,758	10,758	17	.21
Anchor	3,025	2,231	18	.04
	4,749,799	5,189,743		

	1946			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Acme	1,179,907	1,013,760	1	20.76
Imports		911,544	2	18.67
General	558,600	540,043	3	11.06
Rainier	547,774	508,337	4	10.41
Los Angeles Brew	495,952	493,334	5	10.10
Regal Amber	308,278	301,292	6	6.17
S. F. Brew	249,704	240,634	7	4.93
Aztec	228,332	214,914	8	4.40
Pacific	139,448	139,030	9	2.85
Golden West	133,319	133,319	10	2.73
Grace	127,345	127,345	11	2.61
Maier	86,747	86,747	12	1.78
McKee	50,736	48,902	13	1.00
Fresno	43,469	43,469	14	.89
U.S. Brewing	36,073	28,956	15	.59
El Dorado	25,834	25,834	16	.53
Buffalo	22,013	22,013	17	.45
Anchor	4,506	3,503	18	.07
	4,238,037	4,883,066		

	1947			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Imports		1,261,433	1	23.06
Acme	1,159,322	988,823	2	18.08
General	658,255	633,952	3	11.59
Los Angeles Brew	602,098	598,803	4	10.95
Rainier	448,469	388,922	5	7.11
Regal Amber	360,432	357,033	6	6.53
S.F. Brewing	363,149	353,259	7	6.44
Aztec	229,983	224,039	8	4.10
Pacific	201,287	201,087	9	3.68
Maier	148,714	144,360	10	2.64
Grace	127,403	118,642	11	2.17
Golden West	119,173	112,711	12	2.06
El Dorado	33,214	33,214	13	.61
McKee	32,728	32,728	14	.60
Buffalo	12,185	12,185	15	.22
U.S. Brewing	4,542	4,013	16	.07
Fresno	3,910	3,910	17	.07
Anchor	2,174	1,187	18	.04
	4,516,138	5,470,401		

	1948			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Imports		1,280,414	1	24.83
Los Angeles Brewing	750,558	748,929	2	14.52
Acme	862,873	696,258	3	13.50
Lucky Lager (General)	680,720	659,310	4	12.79
Regal Amber	470,155	458,900	5	8.90
S. F. Brewing	461,807	451,560	6	8.76
Pacific	190,533	190,381	7	3.69
Rainier	224,410	173,735	8	3.37
Altes (Aztec)	154,354	152,009	9	2.95
Maier	144,210	142,477	10	2.76
Golden West	86,432	79,886	11	1.55
Grace	116,211	72,988	12	1.42
El Dorado	25,541	25,541	13	.50
Eckert (McKee)	11,190	11,190	14	.22
Buffalo	7,814	7,814	15	.15
U.S. Brewing	2,328	2,328	16	.05
Anchor	1,892	1,892	17	.04
Fresno	749	749	18	.01
	4,191,777	5,156,361		

	1949			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Imports		1,123,387	1	22.09
Lucky Lager	840,932	817,032	2	16.07
Los Angeles	794,955	794,131	3	15.62
Acme	651,489	567,196	4	11.15
Regal Amber	572,056	562,696	5	11.07
S. F. Brew	496,478	488,611	6	9.61
Pacific	165,681	162,441	7	3.19
Rainier	168,372	151,504	8	2.98
Altes	142,689	142,483	9	2.80
Maier	114,100	111,790	10	2.20
Grace	76,871	72,309	11	1.42
Golden West	61,271	57,734	12	1.14
El Dorado	25,977	25,977	13	.51
Eckert	4,471	4,471	14	.09
Anchor	2,123	2,123	15	.04
Buffalo	800	800	16	.02
	4,118,265	5,084,685		

	1950			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Lucky Lager	1,074,442	1,035,358	1	19.75
Imports		1,015,752	2	19.38
Los Angeles Brew	686,358	684,690	3	13.06
S. F. Brew	623,426	607,302	4	11.59
Regal Amber	551,535	544,538	5	10.39
Acme	501,060	496,273	6	9.47
Maier	210,416	210,015	7	4.01
Goebel (Golden West)	187,181	184,571	8	3.52
Pacific	139,221	137,716	9	2.63
Rainier	127,784	120,296	10	2.30
Altes	110,827	110,399	11	2.11
Grace	65,662	64,380	12	1.23
El Dorado	27,797	27,797	13	.53
Anchor	2,406	2,406	14	.05
	4,368,415	5,241,493		

	1951			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Imports		1,057,105	1	19.48
Lucky Lager	1,095,477	1,040,193	2	19.17
S. F. Brew	837,750	806,236	3	14.86
Los Angeles Brew	580,351	576,793	4	10.63
Regal Amber	541,756	523,157	5	9.64
Acme	493,864	441,758	6	8.14
Maier	358,196	358,196	7	6.60
Goebel	218,231	213,810	8	3.94
Pacific	115,729	115,172	9	2.12
Rainier	119,933	112,945	10	2.08
Altes	92,398	92,370	11	1.70
Grace	63,607	62,833	12	1.16
El Dorado	24,220	24,220	13	
Anchor	1,988	1,988	14	.04
	4,543,590	5,426,776		

	1952			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Lucky Lager	1,307,755	1,221,743	1	21.59
Imports		1,103,194	2	19.49
S. F. Brewing	996,416	941,380	3	16.99
Regal Amber	572,159	556.272	4	9.83
Los Angeles Brew	555,398	553,497	5	9.78
Acme	426.048	388,904	6	6.87
Maier	369,671	369,671	7	6.53
Goebel	221,830	208,083	8	3.68
Rainier	89,981	83,923	9	1.48
Wielands (Pacific)	84,552	82,420	10	1.46
Grace	56,711	56,711	11	1.00
Altes	50,221	50,221	12	.89
El Dorado	22,076	22,076	13	.39
Anchor	1,595	1,595	14	.03
	4,754,413	5,659,690		

	1953			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Lucky Lager	1,532,412	1,378,149	1	23.46
Imports		1,106,553	2	18.84
S. F. Brewing	1,017,997	946,817	3	16.12
Regal Amber	601,803	585,646	4	9.97
Pabst (Los Angeles Brew.)	597,932	571,843	5	9.74
Acme	398,028	363,094	6	6.18
Maier	321,617	319,884	7	5.45
Falstaff (Wielands)	327,672	316,790	8	5.39
Goebel	271,710	172,545	9	2.94
Rainier	48,290	44,035	10	.75
Grace	43,032	42,951	11	.73
El Dorado	17,162	17,162	12	.29
Altes	6,572	6,572	13	.11
Anchor	1,591	1,591	14	.03
	5,185,818	5,873,632		

	1954			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Lucky Lager	1,570,493	1,396,827	1	23.91
S.F. Brewing	1,041,100	953,029	2	16.32
Imports	----------	709,960	3	12.15
Pabst	752,745	601,527	4	10.30
Regal Pale (Regal Amber)	607,607	595,852	5	10.20
Falstaff	347,073	323,793	6	5.54
Rheingold (Acme L.A.)	274,813	269,501	7	4.61
Maier	233,650	228,683	8	3.91
Hamm's (Rainier)	225,027	217,939	9	3.73
Schlitz	290,638	140,359	10	2.40
Anheuser-Busch	269,273	126,129	11	2.16
California Brew. (Acme, S.F.)	136,058	121,002	12	2.07
Goebel	144,873	107,940	13	1.85
Grace	33,172	33,164	14	.57
El Dorado	14,061	14,061	15	.24
Anchor	1,584	1,584	16	.03
	5,942,167	5,841,350	----------	----------

	1955			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Lucky Lager	1,606,813	1,388,347	1	22.89
S. F. Brewing	1,071,003	977,561	2	16.12
Imports	----------	681,765	3	11.24
Hamm's	711,612	606,309	4	10.00
Regal Pale	619,009	597,095	5	9.84
Pabst	613,036	541,693	6	8.93
Falstaff	337,864	283,047	7	4.67
Anheuser-Busch	451,910	256,234	8	4.22
Schlitz	508,107	243,190	9	4.01
Maier	224,744	216,957	10	3.58
Rheingold	138,222	135,635	11	2.24
Goebel	108,692	80,912	12	1.33
Grace	32,510	31,552	13	.52
California Brewing	24,320	18,479	14	.30
El Dorado	4,054	4,054	15	.07
Anchor	2,214	2,214	16	.04
	6,454,110	6,065,044	----------	----------

	1956			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Lucky Lager	1,719,714	1,436,720	1	22.79
Burgermeister (S.F. Brew.)	1,072,203	943,762	2	14.97
Imports		838,419	3	13.30
Hamm's	824,322	757,130	4	12.01
Pabst	664,834	607,879	5	9.64
Regal Pale	572,749	553,325	6	8.78
Anheuser-Busch	537,408	323,716	7	5.13
Falstaff	322,131	268,235	8	4.25
Schlitz	501,284	264,860	9	4.20
Maier	153,661	137,884	10	2.19
Rheingold	96,263	92,270	11	1.46
Southern (Grace)	51,861	50,860	12	.81
California Brewing	21,797	17,393	13	.28
Goebel	10,890	10,013	14	.16
Anchor	2,235	2,235	15	.04
	6,511,352	6,304,701		

	1957			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Lucky	1,716,897	1,414,789	1	21.57
Imports		1,014,282	2	15.46
Burgermeister	971,291	887,798	3	13.53
Hamm's	892,319	845,910	4	12.90
Pabst	573,795	538,511	5	8.21
Regal Pale	464,449	452,062	6	6.89
Falstaff	497,158	441,849	7	6.74
Anheuser Busch	576,271	369,020	8	5.63
Schlitz	517,237	283,692	9	4.32
Maier	220,016	195,109	10	2.97
Southern	71,825	67,922	11	1.04
Rheingold	31,938	30,754	12	.47
California	20,270	15,114	13	.23
Anchor	2,825	2,825	14	.04
	6,556,291	6,559,637		

	1958			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Lucky Lager	1,877,022	1,553,338	1	22.39
Imports		1,284,421	2	18.51
Burgermeister	967,113	886,359	3	12.78
Hamm's	851,472	766,512	4	11.05
Pabst	609,969	580,278	5	8.36
Falstaff	490,706	431,553	6	6.22
Regal Pale	432,405	425,744	7	6.14
Anheuser-Busch	584,244	383,894	8	5.53
Maier	329,089	297,642	9	4.29
Schlitz	477,927	273,331	10	3.94
Grace Bros	22,729	20,635	11	.30
Southern	19,067	18,491	12	.27
California Brewing	17,578	13,205	13	.19
Anchor	2,412	2,412	14	.03
	6,681,733	6,937,815		

	1959			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Imports		1,485,482	1	19.96
Lucky Lager	1,812,524	1,466,894	2	19.73
Hamm's	1,080,104	951,603	3	12.80
Burgermeister	973,837	887,106	4	11.93
Pabst	592,783	555,918	5	7.48
Anheuser-Busch	790,579	474,893	6	6.39
Falstaff	539,359	463,912	7	6.24
Maier	426,060	396,541	8	5.33
Regal Pale	342,572	338,244	9	4.55
Schlitz	506,739	292,559	10	3.94
Grace	77,367	74,083	11	1.00
Pacific	47,199	45,025	12	.61
Anchor	1,251	1,251	13	.02
	7,190,374	7,433,511		

	1960			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Lucky Lager	1,719,159	1,320,480	1	17.6
Hamm's	1,117,314	977,865	2	13.0
Burgermeister	891,324	805,289	3	10.7
Olympia	----------	745,663	4	9.9
Pabst	586,306	545,373	5	7.3
Anheuser-Busch	775,772	511,507	6	6.8
Maier	523,215	491,426	7	6.5
Coors	----------	476,656	8	6.3
Falstaff	509,825	416,703	9	5.5
Regal Pale	312,524	309,541	10	4.1
Schlitz	489,836	293,238	11	3.9
Miller	----------	205,200	12	2.7
Other U.S. imports	----------	144,723	13	1.9
Grace	122,044	118,665	14	1.6
Sicks' Rainier	----------	61,853	15	0.8
Outside U.S. imports	----------	42,217	16	0.6
Fisher	----------	22,417	17	0.3
Carling	----------	15,525	18	0.2
Arizona	----------	12,751	19	0.2
Pacific	6,325	6,235	20	0.1
Steam Beer (Anchor)	383	383	21	0.0
	7,054,027	7,523,710	----------	----------

	1961			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Lucky Lager	1,758,884	1,336,731	1	17.3
Hamm's	1,092,755	943,827	2	12.5
Olympia	----------	771,658	3	10.0
Coors	----------	717,511	4	9.3
Burgermeister	726,533	653,898	5	8.5
Pabst	695,855	642,218	6	8.3
Anheuser-Busch	896,899	526,241	7	6.8
Maier	484,767	457,525	8	5.9
Falstaff	492,865	385,893	9	5.0
Schlitz	460,141	283,278	10	3.6
Miller	----------	231,067	11	3.0
Regal Pale	222,844	219,834	12	2.8
Other U.S. imports	----------	156,266	13	2.0
Grace	154,890	150,808	14	1.9
Fisher	----------	80,242	15	1.0
Sicks' Rainier	----------	62,677	16	.8
Outside U.S. imports	----------	47,120	17	.6
Arizona	----------	28,667	18	.4
Carling	----------	19,471	19	.3
Steam Beer (Anchor)	1,633	1,633	20	0.0
	6,988,066	7,716,565	----------	----------

	1962			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Lucky Lager[1]	1,589,716	1,333,185	1	16.4
Hamm's	1,175,914	1,012,495	2	12.4
Schlitz[2]	1,219,995	996,983	3	12.3
Coors		982,924	4	12.1
Olympia		847,570	5	10.4
Pabst	779,312	648,863	6	8.0
Anheuser-Busch	1,074,319	577,282	7	7.1
Maier	489,197	463,825	8	5.7
Falstaff	512,655	389,650	9	4.8
Miller		234,855	10	2.9
Regal Pale	196,265	190,590	11	2.3
Other U.S. imports		150,104	12	1.8
Grace	142,461	137,433	13	1.7
Sicks' Rainier		67,350	14	0.8
Outside U.S. imports		48,536	15	0.6
Arizona		29,042	16	0.4
Carling		21,691	17	0.3
Steam Beer	1,726	1,726	18	0.0
	7,121,560	8,134,104		

[1] Lucky Lager figures include Fisher.
[2] Schlitz figures include Burgermeister.

	1963			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Coors		1,193,795	1	13.8
General (Lucky)	1,487,881	1,169,151	2	13.7
Schlitz	1,419,250	1,120,482	3	13.1
Anheuser Busch	1,333,367	1,033,218	4	12.0
Hamm's	1,201,119	992,580	5	11.5
Olympia		837,440	6	9.7
Pabst	775,214	661,670	7	7.7
Maier	596,656	566,983	8	6.6
Falstaff	474,594	350,835	9	4.1
Miller		227,821	10	2.6
U.S. imports		155,171	11	1.8
Grace	135,462	131,146	12	1.5
Sicks' Rainier		67,301	13	.7
Outside U.S. imports		57,358	14	.7
Arizona		29,185	15	.3
Carling		24,840	16	.2
Steam Beer	1,326	1,326	17	.0
Regal Pale	56	56	18	.0
	7,424,925	8,620,358		

	1964			
	California sales and exports	California sales barrels	Rank	Percentage of share of market
Coors		1,496,008	1	16.3
Olympia		1,109,549	2	12.1
Schlitz	1,286,931	1,036,762	3	11.3
General Brewing	1,219,071	1,033,087	4	11.3
Anheuser-Busch	1,303,716	1,002,334	5	11.0
Hamm's	1,099,117	891,524	6	9.7
Maier	682,699	654,913	7	7.2
Pabst	659,640	551,598	8	6.0
Miller		382,891	9	4.2
Falstaff	405,755	319,161	10	3.5
Other U.S. imports		263,209	11	2.9
Grace	152,726	147,451	12	1.6
Sicks' Rainier		90,969	13	1.0
Outside U.S. imports		76,109	14	.8
Carling		49,967	15	.6
Arizona		45,907	16	.5
Steam Beer	1,469	1,469	17	0.0
	6,781,124	9,152,908		

APPENDIX D

15. *Sales of Beer in Hawaii by Brewers, 1961–1963.* Below is a statistical statement of sales of beer (in number of barrels) by brewers, 1961–1963, in Hawaii, which is hereby authenticated, and it is stipulated that it is evidence of the matters therein recited:

Sales (in barrels) of beer in Hawaii—1961–1963

Brewer	1961	1962	1963
American Brewing Co.[1]	3,419	163	
Anheuser-Busch, Inc.[3]	17,189	18,100	19,587
Blitz-Weinhard Co.[4]			56
Carling Brewing Co., Inc.[4]	7,854	11,380	16,890
Falstaff Brewing Corp.[3]	27,837	31,336	31,964
General Brewing Co.[3]	108,381	98,414	119,719
Grace Bros. Brewing Co.[3]	1,072	780	755
Hamm's Brewing Co.[3]	2,502	7,862	8,705
Hawaii Brewing Corp.[2]	41,752	33,178	31,439
Maier Brewing Co.[3]	1,368	1,259	2,015
Miller Brewing Co.[4]	17,864	22,705	17,609
Olympia Brewing Co.[4]	6,042	8,693	12,524
Pabst Brewing Co.[3]	2,076	1,003	979
Schlitz-Burgermeister[3]	25,405	23,087	28,074
Sick's Rainier Brewing Co.[4]	103		
Total	262,864	257,960	290,316

[1] Taxpaid withdrawal figures. Final report to IRS made in 1962.
[2] Source: Department of Taxation, State of Hawaii.
[3] Source: California Brewers Association figures.
[4] Data supplied by brewer.

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OCTOBER TERM, 1966

JOS. SCHLITZ BREWING COMPANY, *Appellant*

vs.

UNITED STATES OF AMERICA

and

GENERAL BREWING COMPANY

On Appeal from the United States District Court
For the Northern District of California
Southern Division

Objections of General Brewing Corporation to Motion to File Amici Curiae Brief

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CASES	Pages
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Wickersham v. Crittenden, 93 Cal. 17 (1892)	5

STATUTES	
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Objections of General Brewing Corporation to Motion to File Amici Curiae Brief

INTRODUCTION

On September 22, 1966, General Brewing Corporation ("General Brewing") was served with a copy of a Motion for Leave to File a Brief as Amici Curiae and Brief of Amici Curiae. These documents were filed on behalf of two directors of General Brewing, Philip A. Ray ("Ray") and George Alef ("Alef"), and by a shareholder of Capital Estates, Inc., Lewis B. Reynolds ("Reynolds"), the latter individually and as self-styled representative of "all other

minority shareholders of Capital Estates". General Brewing objects to the motion for leave to file an amici curiae brief and requests that the Court enter an order denying the motion on the grounds that it does not satisfy the requirements set forth in the Rules of this Court and that it would serve no useful purpose in this appeal.

In support of its objections, and as a statement of its reasons for withholding its consent to the filing of the amici curiae brief, General Brewing informs the Court as follows:

BACKGROUND

This is a direct appeal from a final judgment of the District Court, entered March 24, 1966, finding that Jos. Schlitz Brewing Company's ("Schlitz") 1961 acquisition of the assets of Burgermeister Brewing Corporation and its 1964 purchase of 39.3 per cent of the outstanding common shares of John Labatt Limited ("Labatt"), which carried with it direct control of Labatt and indirect control of General Brewing, violated Section 7 of the Clayton Act, as amended, 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964). From the District Court's order directing Schlitz to divest itself of its interest in Burgermeister Brewing Corporation and its stock holding in Labatt, Schlitz has appealed. Notice of Appeal was filed on April 27, 1966, and on August 26, 1966, Schlitz filed its Jurisdictional Statement. On September 23, 1966, General Brewing filed a Motion to Affirm. On September 28, 1966, the United States of America filed a similar motion.

APPLICANTS ATTEMPT TO RAISE NEW MATTER NOT PRESENTED TO THE TRIAL COURT

Applicants' request for leave to file must be denied since their motion attempts to raise before this Court, matters which they concede (Motion, p. 2) were "not presented to the District Court".

On review of the judgment below, only the issues set forth in the Jurisdictional Statement may be considered by this Court. *Phillips Chem. Co. v. Dumas Independent School Dist.*, 361 U.S. 376, 386, n. 12 (1960); *Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 433, n. 12 (1963). Amici Curiae must take the case as so presented; they cannot for the first time on appeal raise matter that is irrelevant to the disposition of the issues framed by the Jurisdictional Statement. *R. C. Tway Coal Co. v. Glenn*, 12 F. Supp. 570, 587 (W.D. Ky. 1935); 3 C.J.S. § 3, p. 1052; 4 Am. Jur. 2d § 3, p. 111. See also, *Sutphen Estates, Inc. v. United States*, 342 U.S. 19, 23 (1951); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 315 F.2d 564, 567 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963).

Ray and another attorney for Mr. Paul Kalmanovitz were frequently present in court throughout the trial. At no time during the course of the trial did they or the other applicants request the trial court to allow them to participate in the trial or to voice their views on any aspect of the case. Ray, who is a lawyer (Brief, p. 4), and the other lawyer were content to sit by silently as spectators. Even if otherwise appropriate, the raising of new matter is certainly not permissible under these circumstances at this late stage in the proceedings.

The only purpose that applicants have in filing their Motion and in baring their personal grievances before this Court is to aid Schlitz in obtaining a reversal of the order of divestiture. They attempt to conceal their true purpose behind a camouflage of charges extraneous to this record. Thus, applicants complain that they have been injured as a result of alleged breaches of fiduciary duty; such allegations, even if they were true, "cannot prevail over *antitrust* requirements in this case." See *United States v. El Paso*

Natural Gas Co., 37 F.R.D. 330, 333 (D. Utah 1965). If applicants honestly believe that General Brewing has been guilty of any wrongdoing, and if they can prove that there is merit to their position, California law affords them a right to recover any damages they may have suffered. *Efron v. Kalmanovitz*, 226 Cal. App. 2d 546 (1964); *Remillard Brick Co. v. Remillard-Dandini Co.*, 109 Cal. App. 2d 405 (1952).

This Court, however, should not be concerned with hypothetical and problematic contentions; it should be concerned only with the supposed issues raised by the Jurisdictional Statement of Schlitz. Those issues involve the application of the antitrust laws to a particular set of facts and there has been no showing that with respect to that application the interest of the public will be inadequately represented. See *United States v. General Elec. Co.*, 95 F. Supp. 165 (D.N.J. 1950).

ALL ISSUES HAVE BEEN ADEQUATELY PRESENTED BY THE PARTIES

Consent to the filing of an amici curiae brief was requested by applicants' counsel, but was refused by counsel for General Brewing. This Court's Rule 42(3) requires the motion for leave to file to "set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties and the relevancy to the disposition of the case." Applicants have not satisfied this requirement. Although they do assert that questions exist that will not be presented by the parties, they admit that the only reason that they will not be so presented is that they were "not presented to the District Court." As stated above, such questions cannot be raised for the first time on appeal.

In any event, apart from the smokescreen applicants attempt to create by suggesting that they have been injured by the acts of the majority shareholder, their only point is that the divestiture order should be modified so as to require Labatt to sell off General Brewing. This is precisely the contention repeatedly advanced by Schlitz at trial and now in its appeal. No showing has been made that this contention has not been adequately presented by the parties. Applicants urge the identical result, adding only that in their opinion *they* would be benefited by a sale of General Brewing.

APPLICANTS HAVE FAILED TO DEMONSTRATE THAT THEY HAVE ANY INTEREST IN THESE PROCEEDINGS

Rule 42(3) also requires that the motion for leave to file shall state "the nature of the applicant's interest." Ray and Alef attempt to satisfy this requirement by characterizing themselves as "minority" directors of General Brewing. General Brewing is a California corporation, however, and under the laws of that State there is no such thing as "minority directors." Directors do not represent discrete bodies of shareholders; a corporation is not a federation of groups of shareholders each sending its own representative to the board of directors to advance its special interests. A general fiduciary duty is imposed upon all directors to use their powers in good faith and for the common benefit and advantage of each and every shareholder. *Lawrence v. I. N. Parlier Estate Co.,* 15 Cal. 2d 220, 229-30 (1940); *Wickersham v. Crittenden,* 93 Cal. 17, 29 (1892); *Schwab v. Schwab-Wilson Machine Corp., Ltd.,* 13 Cal. App. 2d 1, 3 (1936).

Accordingly, it has long been the rule in California that the power and authority to manage the affairs of a Corporation are vested in the directors collectively as a board, not as individuals. *Thomasson v. Grace Methodist Episcopal*

Church, 113 Cal. 558 (1896). No decision or act "made or done by any member of the directors while not duly assembled as a board is a valid corporation act." *Smith v. Dorn*, 96 Cal. 73, 82-3 (1892). Thus, it is manifest from the face of the motion that since the board of directors of General Brewing did not authorize the filing of this Motion, Ray and Alef cannot pass themselves off as representing the corporation; indeed, the board of directors of General Brewing at a special meeting called by Ray and Alef and held on September 14, 1966, rejected the very position applicants now present to the Court, and by resolutions duly adopted, declared that such a position was detrimental to the best interests of the corporation. Finally, since neither Ray nor Alef are shareholders of the corporation, they cannot assume the role of spokesmen for the shareholders. Under no theory, therefore, can they demonstrate that they have a valid interest in the proceedings before this Court.

Reynolds claims an interest in the case by virtue of his stock holdings in Capital Estates. The record owner of 1200 shares of Capital Estates' common stock, he holds approximately .00104 of the outstanding shares of that corporation. He asks the Court for leave to file an amicus curiae brief so that he may demonstrate how a sale of General Brewing would benefit *him*. He has made no demand upon the board of directors of Capital Estates; to General Brewing's knowledge, he has not solicited support from any other shareholder of Capital Estates; he is not authorized to speak on behalf of anyone but himself.

But even Reynolds does not have an interest in this appeal. He is only a shareholder in a corporation which has made an investment in another corporation. Can it be said that he has an "interest" in the business affairs of such other corporation within the meaning of Rule 42? If the

investment by Capital Estates was wrongful, if it constituted a breach of fiduciary duty, Reynolds would have a cause of action for damages against Capital Estates. His remedy, however, is provided by State law, not by this Court in this proceeding.

IDENTITY OF APPLICANTS RAY AND ALEF

Ray and Alef, by their representations that they were elected to the board of directors of General Brewing "by over 300 shareholders (owning more than 30% of General's shares worth over $3,000,000 at current market value)," (Motion, p. 1) would have the Court infer that they are the chosen champions of a large, discontented minority of General Brewing's shareholders. In truth and in fact, they are no more than agents of the man whose personal interests they seek to advance by filing this Motion. What they conveniently fail to mention in their Motion is that included within these 300 shareholders is Paul Kalmanovitz, the sole owner of Maier Brewing Company, a substantial competitor of General Brewing in California. Mr. Kalmanovitz's holdings, acquired since this suit was filed and before trial, account for some 20% of the outstanding shares of General Brewing, that of the other 299 shareholders account for less than 10%.

Both Ray and Alef were first elected to the board of directors of General Brewing at the most recent shareholders' meeting. At that meeting, Alef received more than 99.5% of his votes from only one shareholder, Mr. Kalmanovitz. As the Brief states (p. 4), Alef is "administrative assistant" to Mr. Kalmanovitz. Ray, in the absence of opposition by management, had solicited and obtained some 300 proxies. He still needed 169,392 additional votes to get on the board. Mr. Kalmanovitz then caused 470,000 of his votes to be cast for

Mr. Ray, thereby placing Ray on the board of directors along with Alef. It is a patent distortion, therefore, for these two men to characterize themselves as representatives of or spokesmen for any substantial number of shareholders of General Brewing. They are simply agents of Kalmanovitz and Kalmanovitz owns Maier Brewing Company, a substantial competitor of General Brewing.

AN ADDITIONAL REASON FOR WITHHOLDING CONSENT

That the relief sought by Ray and Alef is identical to that desired by Schlitz is neither coincidental nor the result of an independent, disinterested evaluation of all the facts in this case. The identity is calculated, designed to give an apparent legitimacy to Schlitz's argument that the trial court should have directed a sale of General Brewing. This Court must be made aware of the true reasons for the positions of Schlitz and applicants Ray and Alef.

As noted earlier, both Schlitz and Maier Brewing Company ("Maier") are substantial competitors of General Brewing. Applicants agree with Schlitz that General Brewing should be sold, but not for the reasons set forth in their Motion. They are acting in behalf of their principal, Mr. Kalmanovitz, the sole owner of Maier. Kalmanovitz wants to see General Brewing disposed of at a forced sale for the simple reason that Maier, or Kalmanovitz, its owner, hopefully would be able to purchase control of General Brewing at the distressed prices that would result if such a sale were required. Thus, the aims of both Schlitz and Maier would be achieved: the divestiture of General Brewing by Labatt and the purchase of control of General Brewing by Maier.

Maier's purpose in this regard came to light recently with the discovery by General Brewing of a telegram sent by Mr.

Kalmanovitz to Jim Blyth, an officer of Schlitz, during the trial. This telegram pertained to the proposal advanced by Schlitz at the trial that it sell and dispose of the assets of General Brewing and thereby purportedly cure its violation of Section 7 of the Clayton Act. The following is an exact reproduction of the words and symbols as they appeared in the body of that telegram:

CHARGE TO THE ACCOUNT OF
MAIER BREWING COMPANY

TIME FILED
10:30 a.m.
SEPTEMBER 1, 1965

STRAIGHT WIRE

MR. JIM BLYTH
FAIRMONT HOTEL
SAN FRANCISCO, CALIF.

THE FOLLOWING TELEGRAM WAS SENT THIS MORNING TO ROBERT A. UIHLEIN, JR., PRESIDENT SCHLITZ BREWING COMPANY, MILWAUKEE, WITH COPY TO MR. UIHLEIN IN SAN FRANCISCO, IN CARE OF YOURSELF.

QUOTE) MY GROUP IS WILLING AND ABLE TO CONCLUDE OUR AGREEMENT—REACHED AFTER ABOUT EIGHT MONTHS OF DISCUSSIONS re GENERAL BREWING COMPANY—AND EXPECT YOU AND WILL HOLD YOU TO ALSO CONCLUDE THE SAME. I DESIGNATE MY ATTORNEY,—JAMES J. ARDITTO, 611 SUNSET BOULEVARD, LOS ANGELES, CALIFORNIA (626-5133)—AS THE PERSON YOU MAY CONTACT HERE IN LOS ANGELES FOR ANY FURTHER PRESENT DISCUSSIONS re THIS MATTER. I AM COPYING JIM BLYTH AT FAIRMONT HOTEL IN SAN FRANCISCO. (END QUOTE)

PAUL KALMANOVITZ

The purpose of the agreement referred to in the telegram and the purpose of applicants' Motion are identical: the elimination of General Brewing as a competitor of both Schlitz and Maier. Though the other reasons for doing so are clear and adequate, the knowledge of this communication between Schlitz and Maier is an added and compelling reason for General Brewing to deny consent to the filing of the amici curiae brief.

CONCLUSION

Schlitz's violation of the antitrust laws should not be allowed to be obscured by the intrusion of collateral disputes over questions irrelevant to the controlling requirements of the antitrust laws. Applicants do not contend, as they could not, that the Solicitor General and the other parties to this suit are inadequate to the antitrust task. The claim is that the United States Attorney and the Department of Justice and the other parties to this action will give precedence to the antitrust considerations and in the process neglect the "interest" that the applicants and their principal have in the outcome. But, in this case, only the antitrust considerations are properly before this Court. Compare *United States v. El Paso Natural Gas Co.*, 37 F.R.D. 330 (D. Utah 1965).

Insofar as the remedy adopted by the District Court is subject to review, the only question this Court need consider, once it finds that a violation of the antitrust laws has been proven, is whether the remedy is sufficient to protect the public interest. *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961). Applicants' contentions plainly are not relevant to this inquiry.

In short, there has been no showing that any relevant issue before this Court would be inadequately presented un-

less the applicants are allowed to participate in these proceedings. No useful purpose can be achieved by allowing another substantial competitor of General Brewing, Maier Brewing Company, simply to echo the views of Schlitz.

For these reasons and those set forth above, the applicants' Motion should be denied.

Dated: October 4, 1966.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

JOS. SCHLITZ BREWING COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA
and
GENERAL BREWING COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

OPPOSITION OF JOS. SCHLITZ BREWING COMPANY TO MOTIONS TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

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JOS. SCHLITZ BREWING COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA

and

GENERAL BREWING COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

OPPOSITION OF JOS. SCHLITZ BREWING COMPANY TO MOTIONS TO AFFIRM

The separate motions to affirm filed by the United States and General Brewing Corporation do not dispel the substantial and novel questions presented by this appeal. On the contrary, the strained and dissembling arguments advanced by the motions highlight the need for a decision by this Court on important issues affecting the administration of Section 7 in the public interest.

I.

The Substantial Questions Arising From Unconditional Divestiture Of The Labatt Shares Are Unresolved.

Evidently realizing that unconditional divestiture of the Labatt shares is punitive and needless, the motions to

affirm seize the trial judge's insinuation, which was not given the dignity of being made a finding, that he was "not convinced . . . Schlitz had no desire to control General Brewing." The record, however, not only exposes the striking lack of any just basis for unconditional divestiture, but *affirmatively refutes* any notion that "Schlitz may well have sought control of Labatt with an eye to its obtaining control of General Brewing." (Gov't Mot. pp. 5-6, 15; Gen. Br'g Mot. pp. 8-11)

It was uncontroverted below and is incontrovertible now that Schlitz purchased a controlling stock interest in Labatt because American brewers cannot otherwise practicably enter the Canadian beer market. At no time was Schlitz out to snare General Brewing. Equally certain, Schlitz at all times proposed the sale of Labatt's holdings in General Brewing — both before and after it purchased the Labatt shares.*

Indeed, the trial court itself elicited the decisive testimony from witnesses adverse to Schlitz, who had participated in the negotiations and who were openly opposed to Schlitz's entry into Canada. For example, in questioning John H. Moore, president of Labatt, the court asked:

> THE COURT: You never heard any Schlitz representative evidence any interest in Schlitz' continuing to hang on to and operate General Brewing, is that right?
>
> THE WITNESS: That's correct, Your Honor.

---

* As detailed in the jurisdictional statement (pp. 6-7), Schlitz was unsuccessful in trying to effect a sale of General Brewing before purchasing the Labatt shares. Having agreed to pay a premium over the market price in order to gain control of Labatt, which General Brewing somehow finds sinister (Mot. p. 9), Schlitz did not accede to Labatt management's insistence that it absorb the entire and substantial loss on Labatt's investment in General Brewing. (Tr. 719-20, 822, 1036)

THE COURT: All right. (Tr. 823; see also Tr. 719-20, 812-22, 867-68, 1972-74)*

After having similarly examined other witnesses adverse to Schlitz and exhausted the possibilities for impeaching Schlitz as to its purpose in acquiring control of Labatt (*ibid.*), the trial judge observed:

> I think, in part, at least, if not perhaps in large part, that it was the Court who lead inquiry about what was said by and on behalf of the Schlitz representative. It seemed to me, unless counsel have a different view of it, so far as what was elicited by the Court the record would indicate that no representative of Schlitz, so far as any of the testimony now in the record is concerned, evidenced any infterest in General Brewing save as a problem attending the acquisition, and evidence[d] no interest, that I can recall, in continuing the operations of General Brewing. (Tr. 1034-35)

Subsequently, after having heard the corroborating testimony of Schlitz's representatives (Tr. 1035-38, 1059, 1259-65), government trial counsel straightforwardly acknowledged: "It seems to me that Schlitz' position was very well known from the day that they bought it, that they wanted the [Labatt] Board of Directors to get rid of General. This was communicated many times, and there has been testimony in this case about it." (Tr. 1972) What is more, the government proposed no findings to the contrary, nor did it controvert in any way Schlitz's proposed findings that it had no interest in General Brewing.

Rather, the government proposed, and the trial court

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* Mr. Moore, again in response to questions put by the court, further testified that the assets of General Brewing did not enter into any of the negotiations concerning the price to be paid by Schlitz for the Labatt shares. (Tr. 820)

ultimately adopted, the premise that the Labatt-General Brewing nexus must be preserved intact, ostensibly to ensure General Brewing's touted eastward expansion, in spite of its pronounced decline and partial dismemberment while under Labatt's sway. On that flimsy basis, unconditional divestiture of the Labatt shares was ordered. (Juris. St. pp. 16a, 47a-48a)

Such a decree not only far exceeds the trial court's adjudication of illegality, but is totally unnecessary as a measure to mend any competitive impairment found by the court. It also effectively bars Schlitz from entering the Canadian beer market and may well consign General Brewing to competitive oblivion.* All of these defects would be resolved by a decree that orders divestiture only in the event Schlitz is unable to bring about a sale of Labatt's holdings in General Brewing.

Pushing the trial court's groundless remark one illogical

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* At page 7 of its motion to affirm, General Brewing announces the beginning of "a return to its former dominant market position" and points to a first half profit exceeding $900,000 as compared to an operating loss of more than $500,000 for the comparable period in 1965. Of a piece with the rest of its not-of-record assertions, General Brewing neglects to tell the Court that it will incur a substantial operating loss for the entire year and that the profit recorded in the first half of 1966 results solely from a capital gain attending the sale of its Azusa brewery.

The papers General Brewing has filed in this Court, enriched as they are with colorful and extraneous charges, suggest that its malaise goes very deep indeed. Among other examples, General Brewing has gone outside the record to reproduce a telegram in its objections to the amicus brief (p. 9), apparently for the purpose of showing that Schlitz is party to an illicit deal. Perhaps General Brewing is not aware that a reply exists and that Lyle Jones, head of the Antitrust Division's San Francisco office, was advised of the entire episode. (See Appendix for text of reply.)

step further, General Brewing rails that Schlitz purchased the Labatt shares "to injure General Brewing as a competitor of Schlitz." (Mot. p. 16) Just why Schlitz would injure a company in which it had the largest beneficial interest is difficult to fathom, particularly since General Brewing simultaneously claims that Schlitz really sought to control it. (Gen. Br'g Mot. pp. 8-11)* But more important than these conflicting contentions is the undeniable fact that a sale of General Brewing would not only obviate any conceivable objection to Schlitz's continued ownership in Labatt, but would make a positive contribution to competition by freeing General Brewing of Labatt. Any concern that the disposition of Labatt's holdings in General Brewing might harm the latter or create a new problem under Section 7 is more imaginary than real, since the sale would be appropriately supervised by the government and the court.**

The other arguments of the motions to affirm are untenable or largely answer themselves: (1) Thus, the government insists there are "five different ways" in which Schlitz might enter the Canadian market other than by

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* In the same fashion, General Brewing's motion to affirm twice notes that the decree attached to Schlitz's proposed findings of fact and conclusions of law "made no suggestion of a conditional decree of divestiture." (Mot. pp. 10 n. 39, 27 n. 87) General Brewing would have been somewhat more candid with the Court if it had noted instead that such a solution was repeatedly proposed by Schlitz—at pre-trial (*e.g.*, Tr. 10-11, May 19, 1965), in Schlitz's pre-trial brief (pp. 2, 6, 12, 26-8), in its motion to dismiss made at the close of the government's case-in-chief (Tr. 874-83), in its post-trial brief (pp. 24-5, 29), and in its reply brief (pp. 14-5).

** As exemplified by the amicus brief, the district court failed to recognize that when General Brewing speaks Labatt is actually doing the talking, with the result that the best interests of General Brewing have also been lost in the shuffle.

purchasing control of Labatt. (Gov't Mot. p. 15) It states that the testimony on this score was "undisputed" (*ibid.*), notwithstanding extensive oral and documentary evidence to the contrary. (*E.g.*, Tr. 728-30, 1010-11, 1015-17, 1026-31, 1078-80, 1097-1100, 1102, 1113-14, 2001-02, 2005-06, 2008-10, 2022-28, 2029-33, 2036-38; DSX 197) What the government fundamentally ignores, however, is that American brewers have not been able to enter the Canadian beer market by any means—even though they have tried and even though Canada is their nearest foreign market. (*Ibid.*) Testimonial quibbles aside, this is plainly the most persuasive, and indeed irrefutable, kind of evidence. Besides, the government conveniently overlooks the trial court's failure, in this one instance, to adopt any of its proposed findings respecting the claimed ease of entry into Canada. As a matter of cold fact, trade barriers and various forms of parochialism, fostered by governmental policies, frustrate entry into this foreign market. (Juris. St. pp. 6-7)

(2) At no time, until now, has the "potential competition" of Labatt in the United States been argued to invalidate Schlitz's purchase of the Labatt shares. Indeed, government counsel announced below that the thought had not occurred to him. (Tr. 18, May 19, 1965) And General Brewing's president testified at trial that he could see no threat to competition if Schlitz owned Labatt free from General Brewing. (Tr. 492-93) Above all, the trial court's findings in this connection are carefully limited to the possible curtailment of the "potential competition" of General Brewing, as might be aided by the backing of Labatt. (Juris. St. pp. 16a-17a) This promised aid, which seldom materialized or fizzled when it did, could obviously come from other sources. As the court below itself once asked: "What is so magic about Canadian suport?" (Tr. 12, May 19, 1965) Moreover, the government distorts the record when it says that the

introduction of the Labatt brand of beer by General Brewing in 1964 demonstrates Labatt's intention to participate more fully in the American market. (Mot. p. 7)* Officers of Labatt testified that the introduction of "Labatt" by General Brewing was not their idea or even one they encouraged. (Juris. St. p. 16a) At any rate, the venture flopped and is now being abandoned. (See Amicus Br. p. 3) Even as emanating from General Brewing, "potential competition" of this sort hardly merits serious pause. This Court's decisions make clear that potential competition deserving consideration in Section 7 cases must be made of hardier stuff. *United States* v. *Continental Can Co.*, 378 U.S. 441, 458 (1964); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 174-75 (1964); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 661 (1964).

(3) Surely the motions to affirm can gain no comfort from this Court's decision in the *du Pont* case. *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U.S. 316 (1961). That decision, which held that the undoing of an acquisition violative of Section 7 is a natural remedy, did not bestow unrestrained authority on district courts to order divestiture of non-offending and distinct parts of a transaction, nor did it endorse punitive decrees in the guise of restoring competition. And as this Court declared in *International Boxing Club* v. *United States*, 358 U.S. 242, 253 (1959): "The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus by-passing the usual appellate review, has always had the most careful scrutiny of this Court." Plenary review is especially appropriate here since the trial court entered a decree that not only promises the continued attrition of General Brewing,

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* Labatt's own sales in the United States are minuscule, totaling less than 39,000 barrels in 1963. (Juris. St. p. 6 fn.; DSX 189)

but also deprives Schlitz of any opportunity to compete in Canada. The cardinal issue is the extent to which an antitrust decree may shelter a monopoly-minded foreign market. Compare *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951). If either Section 7 of the Clayton Act or the discretion of district courts in formulating antitrust decrees is to be construed to sanction results of this kind, only this Court should render such a far-reaching pronouncement.

II.

The Conflicts Respecting The Consequences Under Section 7 Of Antitrust Division Clearance And Declining Market Share Are Substantial And Merit Resolution By This Court.

Although conceding the Antitrust Division told Schlitz in 1961 that it was not prepared to take any action to block the proposed acquisition of Burgermeister's assets, the government nonetheless insists "no 'clearance' of any sort" was given, because none was asked for or memorialized in writing. (Gov't Mot. pp. 4, 16-7) Yet the current head of the Antitrust Division has stated publicly that oral statements of no present intention to sue contain "substantially everything we would say in a written letter." 30 A.B.A. Section of Antitrust Law 100, 120 (1966). Allowing the government to have it both ways, it is still inescapable that Schlitz's acquisition of the Burgermeister assets was evaluated as to its probable competitive effects under Section 7 before the transaction was consummated, and, on the basis of that evaluation, the government elected not to file suit or even warn Schlitz that it would proceed at its peril.

What weight should be given to such clearances is an issue deserving plenary consideration by this Court. For the government's puzzling inconsistencies regarding this matter indicate a loose and undiscerning enforcement of

Section 7, which can easily overstep the congressional intent so as to thwart rather than promote over-all antitrust objectives. As we suggested in the jurisdictional statement (pp. 22-3), public confidence in the fairness of antitrust enforcement is indispensable to voluntary compliance with the law in the public interest.

After disclaiming its clearance of the acquisition, the government goes on to make the extraordinary claim that "Burgermeister remained a strong, healthy company and any decline was insignificant." (Mot. p. 13 n. 14) Stipulated facts, however, reveal that from 1955 to the year preceding the acquisition Burgermeister's sales in California, where more than 90 per cent of its beer was sold, declined *47.27 per cent* in relation to total industry sales. (Gov't Mot. pp. 47-50).* Discounting Burgermeister's loss of sales in 1961, as the government proposes (Mot. p. 5 n.4), the decline through 1960 is *33.62 per cent*. It defies understanding how such a loss of position in the "rapidly growing" California market can be characterized as "insignificant" or the company, as "healthy." (Gov't Mot. pp. 3, 13).

Against this backdrop of sharply falling sales, and in light of the Antitrust Division's pre-merger clearance of the acquisition, the government's mechanical invocation of *Von's* and *Pabst* is misplaced.** (Gov't Mot. p. 13 n.14) Those decisions refused to extend their reasoning beyond the "case of two already powerful companies merging in a way which makes them even more powerful than they were before." *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 278 (1966). And here, wholly apart from Burgermeister's decline, even "Schlitz was not very successful in

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* Its profits suffered even more. (Juris. St. p. 13)

** *United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966); *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966).

selling its premium brand in the large, rapidly growing West Coast beer market"—as the government so cheerfully chides. (Gov't Mot. p. 3)

Nor does the government's argument become any more persuasive when it insists that Burgermeister's waning performance should be dismissed from consideration because "the Miller Brewing Company—whose share of the California market was insignificant—also offered to buy Burgermeister." (Gov't Mot. p. 13 n.13)* The record discloses that in 1961, the year preceding the acquisition, Schlitz sold 283,278 barrels of beer in California and had 3.6 per cent of total sales. In the same year, Miller, "whose share of the California market was insignificant," sold 231,067 barrels and had 3 per cent of total sales, *or .6 per cent less than Schlitz.* (Gov't Mot. p. 50) On top of this, in 1964, the last year of record, Miller sold 382,891 barrels of beer in California and had 4.2 per cent of total sales, or .6 per cent more than Schlitz's 1961 sales. (Gov't Mot. p. 52) Yet slightly more than a year later, with the approval of the Antitrust Division, Miller purchased General Brewing's Azusa brewery, which is one-fifth again as large as the Burgermeister brewery purchased by Schlitz.

What these conundrums reflect, in sum, are the incongruities of the decision below and the corresponding need for plenary review by this Court.

III.

The Error Of The Trial Court's Rulings On Discovery And The Motion To Reopen Stands Out More Clearly Than Before.

Neither motion to affirm can muster any justification for

* On page 3 of the government's motion, Schlitz "was not very successful" in the West; on page 13, it becomes a "principal competitor" of "strong, healthy" Burgermeister.

the trial court's refusal in this complex proceeding to allow discovery by Schlitz with respect to matters constituting a prominent part of the government's case, *i.e.*, the alleged necessity for perpetuating Labatt's control of General Brewing.

Contrary to what is said in the motions to affirm, the discovery requested by Schlitz would have taken place *before* the August 16 trial date and would *not* have delayed the start of trial. (Gov't Mot. pp. 18-9; Gen. Br'g Mot. pp. 24-5) That was made clear to the trial court when the motions were filed. (Tr. 370, 408, 430-31, July 1-2, 1965) Accordingly, if the writer of the government's motion to affirm had examined the record, he would not have made the statement that the trial court denied the discovery sought by Schlitz because "it determined that further postponement of the trial date to allow the depositions to be taken would be unjustified." (Gov't Mot. p. 19)*

Totally without merit is the claim that two depositions taken in a treble-damage case filed against Schlitz by General Brewing gave Schlitz all that it needed. (Gov't Mot. pp. 9, 19 n.21; Gen. Br'g Mot. p. 24) As Schlitz advised the court below (Tr. 269, June 22, 1965) and as the depositions themselves will show, the examination centered around charges of alleged price discrimination. It was not directed at the issue injected into this case by the government's insistence that General Brewing, notwithstanding its near collapse with Labatt at the reins, was potentially a national brewer but required the support of Labatt to succeed in the venture.*

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* General Brewing's allusion (Mot. p. 24) that the trial court's rulings were designed to keep trade secrets out of Schlitz's hands is baseless. The motion requesting production of documents specifically restricted access to counsel. (Tr. 356-57, July 1-2, 1965)

Similarly farfetched is the notion that Schlitz "forfeited" its rights to discovery by the timing of its motions or by adding new counsel. (Gov't Mot. pp. 18-9; Gen. Br'g Mot. pp. 24-5) Simply put, there was no basis at all for the court to rule as it did, irrespective of what had happened in the course of the proceedings before Schlitz filed the motions in question.

Finally, neither the government nor General Brewing can defend the denial of Schlitz's motion to reopen, except by asking this Court to do precisely what the court below did: resolve the contested issues arising from the sale of General Brewing's Azusa brewery to Miller Brewing Company by accepting, without an evidentiary hearing, the naked assertions of General Brewing concerning the sale. (Gov't Mot. p. 10; Gen. Br'g Mot. pp. 18-20) But as this Court cautioned in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962):

> summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute . . . .

Confronted with this dilemma, the government makes the startling suggestion that any delay resulting from a reopening of the record "might prejudice the business interests of Labatt and General Brewing." (Gov't Mot. p. 19) There is no doubt that this consideration influenced the court below. (See Juris. St. pp. 12, 25, 3a-4a) We submit, however, that it is plain error for a court to resolve issues and determine rights by reference to the "business interests" of a non-party and its puppet.

IV.

The Findings Of Fact And Conclusions Of Law Entered By The Trial Judge Are Simply Not His Own.

As shown in the jurisdictional statement (pp. 19, 26-7), the trial court decided the hotly contested issues generated by this case in an opinion borrowed virtually verbatim from findings of fact and conclusions of law prepared by the government. The government and General Brewing both try to eschew this fact by pointing to the court's protest that it carefully prepared its own findings and conclusions. (Gov't Mot. p. 20; Gen. Br'g Mot. p. 33) But this is not a matter for polite presumptions. Looking to what the trial judge did, a comparison of the findings and conclusions actually entered with those proposed by the government will verify that they are virtually identical.

Whether the trial court's adoption of findings and conclusions prepared by one of the parties is a ground for reversal is not the issue here.* Nevertheless, since cases such as this are subject only to direct review, the failure of the trial court to prepare its own findings and conclusions is an additional reason for this Court to review the correctness of the decision below and the essential fairness of the way in which it was reached. Cf. *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175 (1963); *International Boxing Club* v. *United States*, 358 U.S. 242, 253 (1959); *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 89 (1950).

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* The decision in *El Paso* indicates that it is not an independent ground. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656 (1964).

Conclusion

We respectfully urge that probable jurisdiction be noted so that the questions presented may be heard on the merits, lest Schlitz be "deprived of any appellate review." *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 175 (1963).

Respectfully submitted,

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October 19, 1966

APPENDIX FOLLOWS

APPENDIX

The following is the telegraphic response of Schlitz to the telegram reproduced at page 9 of General Brewing's Objections to Motion to File Amici Curiae Brief:.

> To Paul Kalmanovitz Report Delivery Sept. 2, 1965 Address Maier Brewing Company, Los Angeles, California
>
> As you well know, no promises or guarantees of any kind have been made by Schlitz or its representatives regarding the possible disposition of General Brewing Corporation. Our recent discussion with you concerned solely your appearance as a witness in United States versus Schlitz. Your request for a commitment with respect to General Brewing was unequivocally turned down by Mr. Archer and myself. I advised Mr. Lyle Jones yesterday of your telegram and the circumstances surrounding it. I delayed answering your telegram until today because, as a result of my telephone conversation with your lawyer, it was my understanding that you were to send a retraction. Joseph DuCoeur

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 486

JOS. SCHLITZ BREWING COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA

and

GENERAL BREWING COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

PETITION FOR REHEARING

By summarily denying* Jos. Schlitz Brewing Company any plenary review of a harsh decree of divestiture entered by a single district judge and thereby leaving unanswered the substantial questions presented for review, this Court has clouded important and controversial aspects of anti-trust enforcement:

(1) Does Section 7 of the Clayton Act sanction a decision that prevents an American firm from entering a foreign market in the only way open to it, as Schlitz did here by acquiring control of John Labatt Limited, a Canadian brewer. (2) Are the purposes of the statute furthered by the outlawing of Schlitz's effort to extend its competition to a foreign market, simply because Labatt controlled General Brewing Corporation, a rapidly fading American brewer which Schlitz would not have retained or controlled.

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* 385 U.S. 37 (Nov. 7, 1966).

(3) Can unconditional divestiture of the Labatt shares by Schlitz possibly repair any actual or threatened injury to competition discerned by the district court, inasmuch as the acquisition was adjudged unlawful only because Labatt controlled General Brewing and particularly since General Brewing would demonstrably benefit by the undoing of its ties with Labatt.

The resolution of these issues by the district court lacks any visible means of factual support in the record. Above all, we cannot believe that the legal issues engendered by the decision below are so insubstantial as not to deserve a hearing on the merits, especially since the Expediting Act gives Schlitz a right of appeal to this Court.

Indeed, the collision of Section 7, as enforced below, with the effort of an American firm to pry open a foreign market traditionally closed to outside competition cries out for review here.* This is, moreover, the first opportunity for the Court to reconcile with the broader purposes of the antitrust laws what is at best an overly technical and rigid application of Section 7 to a foreign acquisition and to do so at a time of rising American investment abroad.** At least the issues should be thoroughly explored before this Court's imprimatur is placed on such a far-reaching decision by a single district judge.

Equally significant and deserving of plenary review are the issues respecting Schlitz's purchase of the Burger-

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* Not one American brewer markets in Canada, and not one barrel of American beer has been exported to Canada since 1958 and only 1,261 barrels have been exported since 1950. If trade barriers did not exist, American brewers could ship profitably to population centers in Canada, and many of them have long been plagued with excess capacity.

** Compare *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951), which left unresolved parallel issues arising under Section 1 of the Sherman Act.

meister Brewing Corporation, a California brewer. The head of the Antitrust Division has, in effect, confirmed that the acquisition was "cleared" before it was consummated by Schlitz in 1961. (See Juris. St. p. 15) Furthermore, stipulations between the parties document Burgermeister's severe decline in the years immediately preceding the acquisition, a fact known to the Antitrust Division when it decided not to take any adverse action in 1961. Yet the decision below and the government's motion to affirm were predicated heavily on the contrary assumptions. Pre-merger clearance and declining market share are still controversial aspects of Section 7 enforcement; their significance under the statute should not be obscured by a summary affirmance that neither explores the issues nor explains the result.

• • •

We respectfully submit that sound judicial administration and elemental fairness warrant the grant of this petition for rehearing.

Respectfully submitted,

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December 2, 1966

CERTIFICATE UNDER RULE 58

I, Joseph DuCoeur, one of the attorneys for appellant and a member of the Bar of this Court, certify that this petition for rehearing is presented in good faith and not for delay.

/s/

December 2, 1966